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JAPANESE JURISDICTION
in the
SOUTH MANCHURIA RAILWAY AREAS

JAPANESE JURISDICTION
in the
SOUTH MANCHURIA RAILWAY AREAS

BY
C. WALTER YOUNG, M.A., PH.D.

* * *

JAPAN'S JURISDICTION AND INTERNATIONAL
LEGAL POSITION IN MANCHURIA

BALTIMORE: THE JOHNS HOPKINS PRESS
LONDON: HUMPHREY MILFORD
OXFORD UNIVERSITY PRESS

1931

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Composed and printed in the United States of America by
THE LORD BALTIMORE PRESS
BALTIMORE, MARYLAND.

To
Harold Scott Quigley, A. B. (Oxon.), Ph. D.,
Professor of Political Science
at
The University of Minnesota,
This Volume Is
Respectfully
Inscribed.

"My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired."

—Judge Benjamin N. Cardozo,
Chief Judge of New York Court of Appeals, in "The Nature of the Judicial Process"

GENERAL PREFACE

The three volumes, of which this is one, include the following titles: *Japan's Special Position in Manchuria, The International Legal Status of the Kwantung Leased Territory,* and *Japanese Jurisdiction in the South Manchuria Railway Areas.* These together comprise a series, under the general title: *Japan's Jurisdiction and International Legal Position in Manchuria.* Although they have been written simultaneously, and may be regarded as a unity for the purpose of analyzing the international legal position of Japan with respect to Manchuria, each volume is in itself a unified whole, a separate book.

These studies are not history. They are rather studies in politics and international law. The materials of the historian have been drawn upon only to furnish the essential stuff for a background, and to present the sequence of events which is essential to a delineation, description and evaluation of the particular categories of politics or law dealt with. Facts, then, which may be of interest or essential to the historian, may have had to be intentionally excluded from this study. The methods of dealing with the facts naturally have been those rather of the student of politics than of history. However this may be, the sequence of historical events has been followed, where possible, so that the very de-

velopment of the problems of legal status and right, whether with respect to the Kwantung lease, the South Manchuria Railway, or the general position of Japan in Manchuria, may be traced through from their origins to the present.

Nor are these studies in the field of economics. But, as economic, like historical, facts are intimately bound up with those of politics and the law—as, for example, in the question of the prior right of foreign financiers to furnish the capital under a specific loan contract for the construction of a Manchurian railway—it will be seen that these volumes, especially the one dealing with Japan's claims to a "special position" in Manchuria, are alive with material of interest to the student of international economic relations. Viewed from the point of view of legal rights and status, much will be found here which make up the ground plan, the rights, the restrictions, the avenues through and around which trade and capital enterprises have developed in Manchuria.

Finally, these are not, primarily, studies in diplomacy, foreign policy, or colonial administration. Particularly is this true of the volume dealing with the international legal status of the Kwantung leased territory. This is a subject which lends itself to legal analysis, in spite of its reputed confusion in international law. Japanese administrative rights here and in the South Manchuria Railway areas are studied only in so far as such description may have utility in clarifying the fundamental questions of

legal right, under treaties and international law, which are here considered to the exclusion of questions of administrative organization or the wisdom or unwisdom of administrative policies.

But international legal situations would be deprived of both interest and clearness were they entirely divorced from the realities of diplomacy. The question of intent may be the major subject of a particular inquiry—as that of China's intent in leasing Kwantung to Russia, and permitting its transfer to Japan—and, to answer such a problem satisfactorily, history and diplomacy must be drawn upon for any adequate interpretation. To treat the question of the validity of the Sino-Japanese treaty and notes of 1915, which extended the Kwantung lease period to ninety-nine years, without some considerable attention to the exceptional diplomacy which attended the signing of those agreements, would produce conclusions of little worth—a formalistic dialectic in which no jurist would indulge.

Diplomacy, the complex negotiations affecting Japan's position in Manchuria, even the asides and the overtones of policy, revealed at times by incidents, actions, opinions, perhaps even attitudes which are the psychological stuff that give new meaning, real meaning, to terminology with which we must here deal, these cannot be divorced from a legal analysis.

Japan's " special position " in Manchuria is a far different thing in the mind of a Japanese, who may

not have concerned himself with the question of Japan's legal rights in Manchuria, than it is to those who view that terminology shorn of its aura of historical and patriotic associations. But the possible value and the limitations of our approach here are suggested by this situation. If a defense of that approach or method were necessary, it would be found in the terse language of that eminent English publicist in international law, the late Professor T. J. Lawrence, when he wrote on leased territories in China: " As a rule words describe things. In diplomacy they are sometimes used to describe—well, other things! " These " other things " are very frequently omitted from treaties and official correspondence—but they may be what the master in chancery would be quite willing to regard as admissible testimony.

Inevitably, especially in dealing with Japan's claims to a " special position ", to " special rights and interests ", and to " vital interests " in Manchuria, it has been impossible to avoid some judgment—or perhaps some presentation of a situation which will influence the reader's judgment—as to the right or wrong of a particular state policy. The author has been cautious not to abuse that discretion which he has had to exercise in presenting such materials. Nevertheless, the manner in which he has exercised that discretion is a proper subject for criticism by the impartial reader. A caveat, which may, perhaps, be superfluous if the contents of one

of these volumes be tempered with that of another, needs to be emphasized here: whatever impressions may be gained as to the author's views on the questions of state policy involved may be entirely inadequate reflections of the author's real views on these very questions. In fact, there are numerous such questions pertaining to Japan's position in Manchuria, and dealt with at length in these volumes from a legal point of view, which, if the author's purpose were to appraise foreign policy as such, or pass judgment on the ethical considerations, the questions of intrinsic justice, or even of expediency, would have had to have been developed in a manner far different, and to other conclusions, than are even suggested in these volumes.

The author can lay no claim to having arrived at the maturity of judgment which would enable him to claim complete consistency in the application of his method to so dynamic an international situation as exists in Manchuria. This field is so primed with a special interest for him that the dangers of distortion of what should be a dispassionate and impartial weighing of the facts against the rules of law applicable are many. He has been working in an uncharted frontier, where rules of international law are as frequently honored in the breach as in the observance. "Manchuria and International Law!"—what bedfellows! To introduce one to the other may not always produce congenial consequences.

International law is itself full of wide gaps. There is frequently an absence of universality of accep-

tance of even basic principles. At times, the principle which has widest acceptance by states and publicists alike may fall short of producing justice in a given circumstance. Ethical standards may suffer from the rigid application of a generally accepted legal rule. Are we then to cast aside the rule of law? Is it not essential rather to state the rule of law, then apply it, and remain an honest interpreter of the law, than to attempt to create a new rule of law, founded on nothing but expediency? There is, too, a broader question of expediency involved, for international law itself may be at stake. International law, like all law, is constantly developing. It grows to the ideal, but never can reach it. If the reign of law is to survive, and order remain in international relations, the task of the interpreter of international law is to inquire as to what it is at a particular time, and not to presume for himself the right to so interpret it as to suit his private views as to expediency in applying it to a situation which he, were he a diplomat, might wish to deal with quite otherwise. Here, in Manchurian situations, we shall find numerous illustrations of cases where international legal rules and principles have been badly strained to suit the national purposes of particular states.

This is not to say that legal situations in Manchuria here treated would not possibly have to be interpreted very differently after a decade or two. The law itself will change. Old issues of practical

diplomacy may have to be reopened. For the present, however, it is well to draw the line as sharply as possible between the law as it now exists and the ideal which will bring complete justice in given situations. Diplomacy itself will have to deal with such situations, and may well have to find solutions on the basis of wise policy. Legal rights need clearly to be understood and respected; they may be given up, and, perhaps, must be given up, in the interest of the very state who may have a perfectly valid legal claim to them. It is, nevertheless, essential, particularly in these Manchurian situations, to know the precise limits of legal rights claimed and justifiable before diplomatic negotiation can proceed with practical solutions. There is need, too, to know when rights claimed are not justifiable; to know when actions criticized as taken illegally, are actually justifiable under the treaties and under international law. There has been far too much assertion and counter-assertion as to Japan's treaty rights in Manchuria, without much attention to the verities which, in most cases, can be accurately described.

* * * *

In the several years which the author has required to assemble the materials presented in these volumes he has had the benefit of close association with scores of Japanese and Chinese officials, administrators, technicians and scholars in Manchuria, and with some who, occupying responsible posts elsewhere,

have had intimate kowledge of Manchuria. The generosity with which these individuals have coöperated in furnishing otherwise unavailable data, including much that has not previously been published even in their own languages, has made this work possible. No amount of mere residence in Manchuria could have supplied that need, though it may be that some considerable residence there has enabled the writer to develop those friendships and intimacies without which his investigations must necessarily have been regarded—to put it quite frankly—as pestiferous.

Unfortunately, it is quite impossible here even to mention the many Japanese and Chinese who have furnished the writer with valuable materials for these studies. They will know, perhaps by chance reference to portions of these volumes, how much the author may be indebted to them for materials, and may take that dependence as an expression of the author's gratitude to them.

In the nature of the case—since these studies, and especially one volume, have to do with the South Manchuria Railway—the many officials and staff members of the South Manchuria Railway Company, especially in Dairen, have been of the greatest assistance. The author has time and again imposed upon their more important duties and has received in return unfailing courtesy and consideration. I know of no other private or public institution, at all similarly situated, which could have been approached with greater assurance that my requests would be received with efficiency and generosity. Why the

author, through four distinct administrations which have had the railway in charge, has been so liberally treated will, no doubt, be answered differently by various readers of these volumes. To the author himself, however, this generosity remains somewhat of a puzzle. To Kwantung Government officials, also, the author wishes here to express his gratitude for their coöperation in supplying him with essential materials not otherwise available.

Materials of the Foreign Intercourse Office, maintained by the Chinese Government at Mukden, have been placed at the writer's disposal by Chinese friends. Some have been supplied by Chinese scholars associated with Northeastern University at Mukden; others, by officials. In the nature of the case, many of these materials have had bearing upon those most contested questions, of principal concern in contemporary politics, which have to do with the jurisdiction and activities of the Japanese railway guards along the South Manchuria Railway areas, or have bearing on the administration of the so-called " railway towns ".

Under these circumstances, it must be apparent that it is with no intention to overlook these many favors that the author takes this occasion to express, by specific reference, his indebtedness to his revered professor, Dr. W. W. Willoughby, of the Johns Hopkins University, whose personal counsel has been hardly less valuable than the materials which the author has been permitted to draw from the sev-

eral scholarly books of this distinguished student of constitutional and public law, as well as of the Far East. To thank him for his generous preface is not to admit that his concluding paragraphs are at all defensible!

To Dr. John V. A. MacMurray, formerly American Minister to China, for many years in the service of the Far Eastern Division of the Department of State, and now head of the Walter Hines Page School of International Relations at the Johns Hopkins University, the author's thanks are due for suggestions and valuable criticism. No student of Far Eastern politics and diplomacy can overlook his well-known compilation of China treaties and agreements. He must rather depend constantly upon it.

To those who have labored through the galley proofs, the author wishes here to express his indebtedness for suggestions and criticism. Mr. C. Gordon Post, instructor in political science at the Johns Hopkins University, has taken the responsibility for preparing the indices of these volumes and has executed his task with care and the exercise of a certain judgment for which his training has qualified him. For the tedious task of reading the "first galleys", as well as for her tolerance in listening to the author's defense—not always impregnable—of his original manuscript, and for suggestions as to revision, especially in the interest of clarity of expression, the author wishes here to express his gratitude to Gladys Hildreth Young.

The author's association with the Institute of Current World Affairs, New York City, made possible his return to Manchuria in the autumn of 1930—his former periods of field study in Manchuria having been in 1923, 1926, 1927 and 1929. These volumes, therefore, contain materials dealing with some of the important recent developments bearing on Japan's position in Manchuria.

Whatever may have been the degree of dependence of the author upon certain materials, generously made available in English translations from Japanese and Chinese originals, he is in a position to accept full responsibility for such use as has been made of them in these studies. For the material content of the volumes, the interpretations presented, and the conclusions drawn, he must assume like responsibility.

C. Walter Young
The Dundee Arms
Baltimore
July, 1931

FOREWORD

BY

W. W. WILLOUGHBY

The Washington Conference of 1921-1922 marked the beginning of a new era in the history of China's dealings with the other Powers. For the first time China was then enabled to sign treaties and other agreements which secured benefits to herself. Prior to then she had been compelled to grant rights to the other Powers. Since then she has continued her efforts to free herself from the conventional limitations upon the free exercise of her sovereign powers, with the result that the time does not appear far distant when she will be, in almost all respects, mistress within her own political household.

However, it is clear that it is within the Manchurian provinces that she will find her greatest difficulty in bringing about a status that will be completely satisfactory to herself, for it is there that Japan has developed such extensive economic interests that she is unwilling to look forward to the time when the maintenance of these interests will be wholly subject to the political control of China. Therefore, although, in a number of respects, Japan has yielded to China's insistent demands for a greater freedom from the unilateral limitations that

have been imposed upon her sovereign action, she, Japan, has jealously guarded those treaty rights, which, in her opinion, make more secure, or, perhaps, more ample, these economic interests which she has in the Manchurian area, and which, she has several times declared, are vital to her own national life.

At the same time, it is to be observed that some of the more important political or jurisdictional rights in Manchuria to which Japan now lays claim are based upon the treaties and agreements which resulted from the " Twenty-one Demands " which Japan made upon China in 1915, and which, because of the nature of those demands, and of the circumstances under which they were made, the Chinese, though compelled to sign them by a formal ultimatum from Japan, have consistently declared to be without a moral basis, and, therefore, subject to be disregarded by them when the opportunity to do so presents itself.

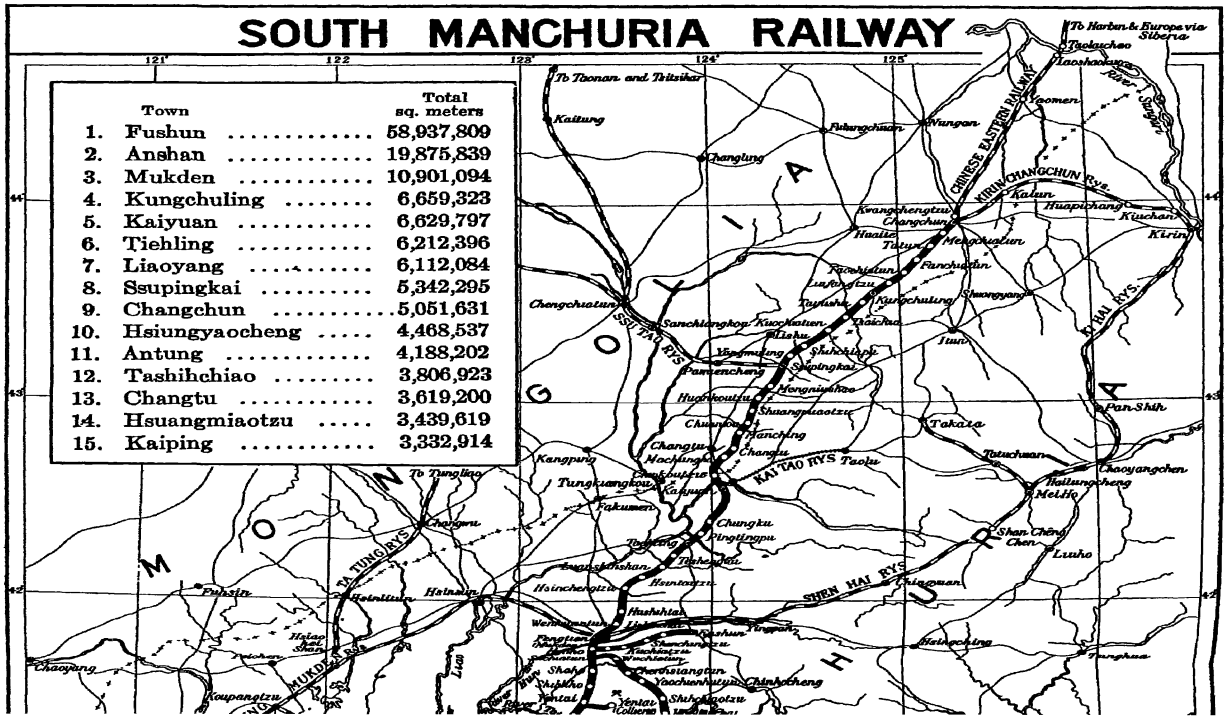
A further complicating factor in the Manchurian situation is that provided by the Russian interests. At the present time, leaving aside the situation in Outer Mongolia, these relate principally to the Chinese Eastern Railway. In addition to this railway problem, which is an exceedingly complicated one, there is no assured confidence upon the part of either China or Japan that, when Soviet Russia has brought her domestic household into what would appear to be a permanently satisfactory order, she will not again attempt to extend her political control over the

northern parts of Manchuria, or even, under favoring circumstances, over southern Manchuria, and thus not only trespass upon China's territorial sovereignty but again present that threat to Japan which, in 1905, led to the Russo-Japanese War.

It is clear, then, that here in Manchuria exists a situation which can easily lead to serious international conflict. This being so, it is of the utmost importance that the facts of the situation should be made clear to the world. In the present volume, which is one of a series of three, Dr. Young has sought to do this so far as the jurisdictional rights to which Japan lays claim in Manchuria are concerned. It is a fortunate fact that one so eminently qualified should have set himself to this task. By his previously published writings, Dr. Young has gained for himself a high reputation as a scholar in this field. More than this, he has shown an ability to deal in an impartial way with problems which, to one less objectively minded, offer abundant opportunity for emotional and, therefore, less balanced treatment. Also, it is to be added, that Dr. Young has not contented himself with the information obtainable from official documents and other printed sources, but has made repeated visits to China and Japan, and has travelled extensively in Manchuria in order that he might see conditions at first hand, and, by personal interviews with leading officials, obtain a truer insight into the significance of these conditions than could be derived from an examination of printed documents or from formal official declarations.

It is the considered opinion of the writer that these three volumes constitute one of the most important contributions which have been made during recent years to the scientific study of political conditions in the Far East. It is to be hoped that Dr. Young will, in the near future, carry his studies of the Manchurian problem into other than the purely jurisdictional field, and provide scholars with an evaluation of the essential economic, social and political interests which are involved, as well as with a detailed account of the manner in which the jurisdictional rights in Manchuria have, in practice, been exercised and of the results that have flowed therefrom. One may even hope that Dr. Young will eventually feel justified in departing from the purely scientific and objective field, and enter that of the statesman in order to express his own matured and factually fortified judgment as to what should be the Manchurian policies of all the nations concerned.

W. W. W.
The Johns Hopkins University
July, 1931



	Town	Total sq. meters
1.	Fushun	58,937,809
2.	Anshan	19,875,839
3.	Mukden	10,901,094
4.	Kungchuling	6,659,323
5.	Kaiyuan	6,629,797
6.	Tiehling	6,212,396
7.	Liaoyang	6,112,084
8.	Ssupingkai	5,342,295
9.	Changchun	5,051,631
10.	Hsiungyaocheng	4,468,537
11.	Antung	4,188,202
12.	Tashihchiao	3,806,923
13.	Changtu	3,619,200
14.	Hsuangmiaotzu	3,439,619
15.	Kaiping	3,332,914

INTRODUCTION

The South Manchuria Railway and its predecessor, the southern branch of the Chinese Eastern Railway from Changchun to Port Arthur and Dairen, has a history and international legal status exceedingly complicated and entirely unique. Situated as it is on Chinese soil, but owned and operated for the term of the concession period which, under present treaties, expires at the end of ninety-nine years, or in 2002, the South Manchuria Railway is in truth an *imperium in imperio.*

Were the South Manchuria Railway operated as a purely economic enterprise by the Japanese concessionnaire, the Japanese Government, the problems of adjusting this railway's position to the fact that China is sovereign over Manchuria and over the very areas traversed by the railway would be considerably simplified. In fact, however, these problems are manifold for two reasons: although the railway is operated by a " joint stock company ", this company is an official Japanese Government institution, having been created by the government and possessing only such powers as have been conferred upon it by the Japanese Government. Again, the South Manchuria Railway Company, in coöperation with the Kwantung Government, which has police functions in the railway areas, exercises broad administrative and jurisdictional functions over its " attached

lands "—over the various areas which are popularly called the "railway zone".

Japanese government-ownership and control of the railway's enterprises, which include also the Fushun collieries and the Anshan iron mines and steel works, are illustrated by government ownership of one-half the capital stock of the company's shares, by majority ownership of the bond capital, and by the authority, under the company's articles of incorporation, to appoint the leading officials of the South Manchuria Railway Company, and thus, to determine the railway's policies. The political administrative and jurisdictional functions of the Japanese Government, exercised through the South Manchuria Railway Company and the Kwantung Government, include practically exclusive municipal administration in the many "railway towns" along the railway, including the so-called "railway settlements" in Mukden, Yingkow (Newchwang), and Antung.

The problem of the South Manchuria Railway is considered in Chinese opinion as one of the most vital questions in the contemporary relations of China and Japan. Chinese opinion, official and unofficial, has for years declared that this railway should be shorn of its political functions, and reduced to a "purely economic enterprise". Just how that may be accomplished has rarely been specifically described: the fact of ownership by the Japanese Government, and the existence of a complicated body of treaty rights under which political functions, such

as municipal administration, are, and for a quarter century have been, exercised by the Japanese along this railway, would require that these two considerations be materially altered before the South Manchuria Railway could properly be called a "purely economic enterprise".

In this volume the author has sought to describe the historical development of Japan's claims to exercise jurisdictional rights in the South Manchuria Railway areas, and to deal specifically with such subjects as municipal taxation, jurisdiction in local courts, municipal police and the problem of the railway guards. This has necessitated a careful analysis of the original Russian rights under the Sino-Russian railway agreements of 1896 and 1898, by which the Chinese Eastern Railway Company obtained and operated the entire Manchurian system, including the main line between Manchouli and Pogranitchnaya via Harbin, and the original southern branch from Harbin to Port Arthur. Under the treaty of Portsmouth Japan obtained the transfer of those rights from Russia, Chinese approval of the same having been given in the treaty of Peking of December 22, 1905. The student of this complicated question, therefore, must familiarize himself both with these basic conventional agreements of the Russian period and the subsequent Sino-Japanese agreements, some of which have been locally negotiated in Mukden. These explain the degree to which the Japanese position today rests on *de jure* treaty rights or,

on the other hand, on *de facto* rights, acquiesced in for a period of years by the Chinese Government, but without specific formal treaty bases.

There is, too, the interesting question of the status of foreigners, *i. e.*, for example, British and Americans, who reside in the South Manchuria Railway areas. This subject has been developed here for the first time in a comprehensive manner. It reveals a decided contrast between the international legal status of the South Manchuria Railway areas and the Kwantung leased territory.

Considerable attention has been given, also, to a description of the so-called " railway zone "—the conclusions drawn constituting a criticism of that term. The unique status of the areas administered by the South Manchuria Railway Company at the " open ports " of Mukden, Yingkow and Antung, is here developed, perhaps in a manner to eliminate the confusion which has always surrounded this subject.

The importance of the South Manchuria Railway, which includes the short Yingkow line and the lengthy Antung-Mukden line from Chosen to the heart of Manchuria, as well as the main line between Dairen and Changchun, the junction point with the Chinese Eastern Railway, now under joint Sino-Russian management, is evidenced by its geographical position—being the only railway connecting with Dairen, the principal port of Manchuria. Connecting, as it does, with several Chinese lines which are either operated or financed by the South Manchuria

Railway Company, it draws goods traffic from points which lie even north of the main line of the Chinese Eastern, from former Inner Mongolia, and from eastern Kirin province.

No railway in Manchuria, perhaps in all China, has been more efficiently managed than the South Manchuria Railway, the Japanese Government having taken pains to appoint able men to the board of directors and to see that the entire staff is composed of competent railway men. This railway has, therefore, played a major rôle in the economic development of Manchuria. Whether this economic rôle could continue if the South Manchuria Railway Company were reorganized to eliminate the paternalistic political surveillance of the Japanese Government is a subject not discussed in this volume. We deal here with the fundamental questions of legal status and jurisdictional rights which need to be understood as a preliminary to any solution devised to make the South Manchuria Railway a "purely economic enterprise".

The South Manchuria Railway is, in truth, the backbone of Japanese enterprise in Manchuria—of whatever character. Its history, its status and importance to the Japanese are, however, such that the railway can be studied as a problem distinct from that of the Kwantung leased territory. The views of various Japanese scholars to the effect that the railway and the leased territory have an international legal status similar, if not practically identical, are subjected to criticism in the following pages.

In the nature of the case, the student who would base his judgments on realities with respect to this railway problem is compelled to study the problem on the field, for published materials on the subject are conspicuously rare, and, of those which have been published, only a very small part can be considered either entirely adequate or authoritative.

C. W. Y.

NOTE.—In such an expression as the following "the British Government have taken the position, etc." it will be noticed that the author has adopted, in the following pages, the grammatical usage of the British Foreign Office which requires that a plural, and not a singular, verb be used after a subject which designates a particular government. The practice of the governments of the United States, Japan and China, in English-language correspondence, is not uniform, a plural verb frequently being used by each of them. An effort has been made here to be consistent.

Grammatically, either form of the verb is entirely correct. The plural form has here been used because of the greater consistency of the British Foreign Office in this matter of style in diplomatic correspondence, because, where quotations especially from British sources are incorporated into the author's text, it is desirable to preserve the number of the verb, because of the superiority of the pronoun "their" to "it," referring to a government, and because it is presumed that the requirements of respect for particular governments counsel use of the plural verb. Consistency in this regard would facilitate translation into the Chinese or Japanese languages.

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JAPANESE JURISDICTION IN THE SOUTH MANCHURIA RAILWAY AREAS

CHAPTER I

The Original Russian Jurisdictional Rights

1. Conventional Bases and Resulting Controversies over Jurisdiction. There is no more controversial legal question in the relations of China and Japan over Manchuria than the question as to the character of Japan's rights to exercise jurisdiction over, and establish administrative agencies in, the so-called South Manchuria Railway Zone. The question involves a confusion as to the very areas so included, raises the fundamental question as to what are legal means of acquiring additional lands for the use of the railway, and requires for its explanation a thorough analysis of the treaty rights whereby Japan claims to exercise the whole body of administrative and judicial functions—police, taxation, transference of land titles and general municipal administration in the railway towns—all of which functions are in practice exercised by the Japanese today in the South Manchuria Railway areas. Japan's legal rights, in so far as they exist with respect to these functions, functions usually possessed by the state having sovereignty over territory, are deriv-

able, in the main, from the Russian rights conferred by China in the agreements of 1896 and 1898 pertaining to the Chinese Eastern Railway. The treaty of Portsmouth of 1905 transferred these to Japan. China agreed to these transfers in the Sino-Japanese treaty of Peking of December 22, 1905.

This raises at once the fundamental question as to just what those administrative rights were which Russia possessed in the Chinese Eastern Railway areas previous to 1905. This is a problem of law which had never been clearly agreed upon by the Chinese and the Tsarist governments. The very texts of the railway agreements are confusing, replete with ambiguity, and are, consequently, capable of divergent interpretation, particularly through conflict of the contract clauses and one significant discrepancy in the Chinese and the French texts of the original agreement of September 8, 1896. Consequently, when Japan acquired the transfer at Portsmouth of that portion of the Chinese Eastern Railway south of Kuanchengtzu, there was no agreement between Russia and China as to the extent of the Russian rights within that area. Japan received, therefore, from Russia a questionable right to exercise unlimited administrative authority within the various municipalities, or " railway towns ", strung along that portion of the Chinese Eastern which, after 1906, became the South Manchuria Railway. The very expression " railway zone " does not appear in any of the early agreements between China and

Russia (as represented by the Russo-Chinese Bank or the Chinese Eastern Railway Company), and there had been no agreement defining the extent of lands which might be acquired for the use of the railway.

The Chinese Eastern Railway was, in its origin, practically a Russian-managed enterprise, financed and constructed by Russian money and direction. Although it had the nominal form of a private commercial enterprise, it was, in fact, an agency of the Russian Government in Manchuria. In behalf of the Russian treasury and foreign office the Russo-Chinese Bank was formed in St. Petersburg in 1895 with the principal object of acting for Russia in obtaining the contract from China for the construction of the railway in Manchuria, the short-cut to Vladivostok.[1]

[1] The charter was Russian, approved by the Minister of Finance at St. Petersburg on Dec. 22, 1895. (MacMurray, Vol. I, 78.) This source gives an alleged agreement with China of Aug. 28, 1896, whereby China was permitted to contribute 5,000,000 Kuping taels to the capital of the bank, and to participate accordingly in its profits. The charter itself may be found in: *Manchuria Treaties and Agreements*, p. 17.) There has long been confusion over the initial capitalization of this bank and the source of the funds which actually went into the construction of the Chinese Eastern Railway. It appears that at the time of the organization of the bank, the Russian Government paid 5,000,000 gold rubles toward its share capitalization. In return for this the bank issued to the Russian State Bank a receipt to the effect that the equivalent in shares was received. No share certificates, however, were apparently issued. But by this transaction the Russian Government actually received control of the bank itself. It is well known that the Russian Government borrowed money in French markets to enable Russia to finance this bank and the railway. These loans, however, were loans to the Russian Government, not to the

The Russo-Chinese Bank and the Chinese Eastern Railway Company were, in actuality, Russian government institutions, and in Manchuria served as but partially disguised arms of the Russian Ministry of Finance and Ministry for Foreign Affairs. Although the president of the Chinese Eastern Railway was always to be a Chinese, nominated by the Chinese Government, and although the Chinese Government were given a semblance of financial participation in the railway by agreeing to pay the sum

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Russo-Chinese Bank, and the French bankers received Russian Government Bonds, not shares in the bank or the railway, as collateral. The French claim, therefore, would appear to be a claim on the Russian Government and not on the bank or the Chinese Eastern Railway. Subsequent bond issues were taken up, after 1896, by the Russian Government itself, or by private or government banks. Official figures for the original construction cost of the Chinese Eastern Railway are, in themselves, mutually contradictory. The Chinese Eastern Railway in 1929 gave the figure of 397,663,000 gold rubles. (*Statistical Year Book*, 1929.) A statement in *Pravda*, obtained by the writer in Moscow, declares the original construction cost to have been 519,649,000 gold rubles. Mr. B. Bakmetieff, Ambassador of the defunct Kerensky government in Washington, is authority for the approximate figure of 500,000,000 gold rubles, or, as he has elsewhere stated, 428,600,000 gold rubles. (Cf. *Slavonic Review*, December, 1929.) Soviet Ambassador Troyanovsky at Tokyo, in a conversation with the writer in December, 1929, gave the approximate figure of 350,000,000 gold rubles as his estimate of the original construction cost. This is the figure given in The *China Year Book*, 1928. These figures do not include the additional items for construction of the section which was in 1905 transferred to Japan and which became the main line of the South Manchuria Railway. These figures should be distinguished from those which purport to give the *total indebtedness* of the Chinese Eastern Railway to the Russian Government, including the years from 1900 to the present, and which are stated to mount to something over one billion gold rubles, or something like three times the original cost of construction.

of 5,000,000 Kuping taels to the Russo-Chinese Bank,[2] these were but devices to conceal the preponderance of Russian official control of the railway. Management of the line, under the Russian statutes for the railway, was practically vested in the Russian general manager—later in the engineer-in-chief.[3] The articles of incorporation of the Russo-Chinese Bank cannot be taken at their face value. General Kuropatkin, who had ample occasion to appreciate both the bank's and the railway company's character in Manchuria on the eve of the war with Japan, referred to the Russo-Chinese Bank as under the direct

[2] Sino-Russian contract, between the Chinese Government and the Russo-Chinese Bank of Sept. 8, 1896, for the construction and operation of the Chinese Eastern Railway. (MacMurray, Vol. I, pp. 74 ff.) The subject of the original Chinese financial participation in the Russo-Chinese Bank and in the Chinese Eastern Railway is still very confused. There is no agreement as to just when, and in what form, the Chinese Government actually paid into the bank the two sums of 5,000,000 Kuping taels each, mentioned in the two agreements. One of these sums, however, seems to have been paid in. It is known that when the Russians took charge of the customs house at Newchwang during the Boxer Rising they turned the customs receipts into the Russo-Chinese Bank there, and it is believed that this was credited in part to the Chinese share in the railway. At least it was admitted by the French operators of the recognized Russo-Asiatic Bank (name assumed in 1910) in 1920 that the railway still owed 5,000,000 Kuping taels, plus interest, to the Chinese Government. The Chinese delegation at the Washington Conference made the same assertion. However this may be, it is in amount only a small part of the vested proprietary interest of the Russian Government.

[3] These devices, giving the Chinese Eastern Railway Company and the Russo-Chinese Bank the semblance of purely private commercial concerns, were utilized because Li Hung-chang had strongly opposed the Russian wish to have the railway a formal Russian government-enterprise. (*Vide:* Dr. C. C. Wang's article, *Annals of the American Academy of Political and Social Science,* November, 1925.

control of the Russian Ministry of Finance, which at one and the same time was "managing in the Far East railways, a flotilla of merchant steamers, a certain number of armed vessels, the port of Dalny, and the Russo-Chinese Bank".[4] Baron Rosen, Tsarist Minister at Tokyo just before the Russo-Japanese war, characterized the bank as a "hybrid politico-financial institution which in reality was but a slightly disguised branch of the Russian treasury".[5] It was, indeed, "the Mr. Hyde to Russia's Dr. Jekyll" by which the Russian Government possessed "a means of doing everything that was impossible for it to do as a Government".[6]

It is not within the purpose of this study to develop the confused question of Chinese and Russian official financial participation in the Russo-Chinese Bank or the Chinese Eastern Railway.[7] Sufficient to emphasize that both of these two institutions were

[4] General Kuropatkin, *The Russian Army and the Japanese War.* Vol. I, p. 172.

[5] Baron Rosen, *Forty Years of Diplomacy,* Vol. I, p. 198.

[6] *Nineteenth Century,* June 1903, p. 938.

[7] Count Witte, the financial genius behind these extraordinary devices which made political penetration in Manchuria appear less noxious than what soon proved to be the reality, wrote in his *Memoirs* (p. 95): "The terms of the railroad concession granted by China were very favorable for Russia. The agreement provided for China's right to redeem the road at the expiration of 36 years, but the terms of the redemption were so burdensome that it was highly improbable that the Chinese Government would ever attempt to effect the redemption. It was calculated that should the Chinese Government wish to redeem the road at the beginning of the 37th year, it would have to pay the corporation, according to the terms of the concession, a sum not less than 700 million rubles [*circa* $350,000,000]."

political instruments of the Russian Government, and that anything by way of conferring a right of administration of the railway, its lands and its railway settlements, was practically tantamount to granting that right to the Russian Government. The two basic railway contracts of 1896 and 1898, therefore, become political conventions, than which none are more important in an endeavor to ascertain just what administrative, and perhaps judicial, rights were granted to the Russians in the Chinese Eastern Railway areas. These were the two basic documents by virtue of which the Japanese Government, after 1905, claimed to exercise administration with legal rights within the areas of the South Manchuria railway.

The first railway agreement of 1896 was signed in pursuance of a treaty of alliance between China and Russia, dated June 3 (Russian date being May 23), 1896.[8] This, the famous Li-Lobanoff alliance, provided, in addition to establishing a defensive alliance against Japan, that China would agree to the construction of a short-cut for the Trans-Siberian system across northern Manchuria " to facilitate the access of the Russian land troops to the menaced points ". Russia promised that this Manchurian short-cut was not to serve as a pretext " for any

[8] MacMurray, Vol. I, p. 81. A telegraphic summary of this treaty of alliance was presented by the Chinese delegation at the Washington Conference. (*Conference Proceedings,* p. 1414.) There is today no question of its authenticity. (*Vide:* Young, C. Walter, *The International Relations of Manchuria.* Appendix A.)

encroachment on Chinese territory nor for any infringement of the rights of sovereignty " of China. The newly formed Russo-Chinese Bank was to receive the construction contract. China might recover the railway system from the company, thirty-six years after its opening to traffic, by payment of the capital investment, any debt of the road and accrued interest, or after eighty years without any payment.

The first, then, of the two principal agreements which defined the scope of administrative authority granted to the Russians in the Chinese Eastern Railway areas was the contract of September 8, 1896, for the construction and operation of that railway.[9] The only clauses in that agreement bearing on jurisdictional rights are the following:

"*Article 5.* The Chinese Government will take measures to assure the safety of the railway and of the persons in its service against any attack.

" The Company will have the right to employ at will, as many foreigners or natives as it may find necessary for the purpose of administration, etc.

" Criminal cases, lawsuits, etc., upon the territory of the railway, must be settled by the local authorities in accordance with the stipulations of the treaties.

"*Article 6.* The lands actually necessary for the construction, operation and protection of the line, as also the lands in the vicinity of the line necessary for procuring sand, stone, lime, etc., will be turned over to the Company freely, if these

[9] MacMurray, Vol. I, pp. 74-77. Translation from the French text as printed in *Soglashenia*, p. 4. Note should be taken of the fact that the second paragraph of Article 6 is absent from the Chinese text—a most important omission.

lands are the property of the State; if they belong to individuals, they will be turned over to the Company either upon a single payment or upon an annual rental to the proprietors, at current prices. The lands belonging to the Company will be exempt from all land taxes (*impôt foncier*).

"The Company will have the absolute and exclusive right of administration of its lands. (*La Société aura le droit absolu et exclusif de l'administration de ses terrains.*)

"The Company will have the right to construct on these lands buildings of all sorts, and likewise to construct and operate the telegraph necessary for the needs of the line.

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"*Article 8.* The Company is responsible that the Russian troops and war material, despatched in transit over the line, will be carried through directly from one Russian station to another, without for any pretext stopping on the way longer than is strictly necessary.

"*Article 12.* The Chinese Government transfers to the Company the complete and exclusive right to operate the line on its own account and risk, so that the Chinese Government will in no case be responsible for any deficit whatsoever of the Company, during the time allotted for the work and thereafter for a further eighty years from the day on which the line is finished and traffic is in operation. This period having elapsed, the line, with all its appurtenances, will pass free of charge to the Chinese Government.

"At the expiration of thirty-six years from the day on which the entire line is finished and traffic is in operation, the Chinese Government will have the rights to buy back this line upon repaying in full all the capital involved, as well as all the debts contracted for this line, plus accrued interest."

Before discussing the implications of these articles in the 1896 contract agreement it is important to note that all of the pertinent provisions of this

agreement became applicable to the southern branch of the Chinese Eastern Railway, between Harbin and Port Arthur, by virtue of the contract for that extension, signed on July 6, 1898.[10] This contract agreement, made in pursuance of a permit to construct such a railway in the Sino-Russian convention for the lease of the Liaotung peninsula, including Port Arthur and Dalny, dated March 27 of the same year, provided that the branch line to Port Arthur from Harbin should be governed by the same articles as contained in the 1896 agreement. The exceptions were insignificant. Additionally, however, it was provided that:[11]

"Article 4. . . . . The Company shall also be allowed in the regions traversed by this branch line to mine such coal as may be needed for the construction or operation of the railway, the price of which coal shall be fixed by the Engineer-in-Chief or his Deputy in consultation with the local authorities but shall not exceed the royalty paid by other parties in the same locality."

With the exception of minor agreements, locally negotiated in Harbin, with respect to mining and timbering rights of the railway company in restricted areas of Heilungkiang and Kirin provinces, and certain agreements after 1900 dealing with the evacuation of Russian troops after the Boxer Rising, there were no other bilateral agreements which established an international legal basis for the Russian

[10] MacMurray, Vol. I, pp. 154-156. Overlach, T. W. *Foreign Financial Control in China*, p. 86.

[11] MacMurray, Vol. I, p. 155.

claims to exercise political administrative authority in the Chinese Eastern Railway Areas. The status of the Russian rights, however, altered materially after 1905.

What, then, if any, were the rights of political administration granted to the Russian management of the Chinese Eastern Railway within the lands acquired for its use? Comparison of one article with another in the original 1896 railway agreement reveals at once that the document contains numerous ambiguities, mutually irreconcilable grants of authority, terminology which is careless from a legal point of view, and reveals the existence of a paragraph in the French text which does not appear at all in the Chinese text.[12] There is no article in the agreement establishing either as the official text for purpose of interpretation of mooted points. In the absence of any such provision it is doubtful if it is reasonable to presume that the Chinese text has greater validity than the French text, partly because this agreement is not technically a treaty, and the rules of international law for interpretation of a railway contract agreement are by no means as clearly established—if such rules applying to formal treaties can be themselves called clear—as for a formal treaty. Of greater import, however, is the fact that

[12] Chinese text *and* the French text contained in: Wang, C. C. *Railway Loan Agreements of China*, Vol. I, pp. 1 ff. Published by the Chinese Ministry of Communications, Railway Department, Peking. (2 vols. Nov. 11, 1921.)

the very existence of a neutral-language text, in this case not questioned by the Chinese Government, raises the presumption that its language is more reliable—Chinese being a language not well adapted to exactitude in international legal terminology. This railway contract, having broad political implications, was *sui generis*. It is with questionable reasonableness, therefore, that the rule of interpretation applying to cases of so-called servitude should be applied here and that consequently the text of the grantor should be definitive. Inasmuch, moreover, as the French text had the approval of the Chinese Government and is published as equally authoritative with the Chinese text in their official railway agreement collection of 1921, it is reasonable to conclude that the clause in Article 6 granting the railway company " absolute and exclusive right of administration of its lands " is a valid source to which the Russians could point in endeavoring to establish their administrative authority.[13]

It is necessary, however, to interpret that clause in the light of the entire agreement, a basic consideration in the interpretation of any international agreement being " to get at the real intention of the parties ".[14] And this, in the case of the 1896 railway

[13] It was not until after 1907 during the controversy over the Harbin municipality issue that the Russian Government revealed this important article in the French text.

[14] Westlake, *International Law*, Vol. I, p. 282. Professor Lawrence, who drew attention to the ambiguity of international law as to this subject of interpretation of treaties, concluded, however, that " or-

contract agreement, which is so fundamental both in determining the Russian and the subsequent Japanese rights of jurisdiction, is no easy matter.

The Russian *intent* in obtaining this railway contract agreement was plainly one thing. The Chinese *intent* was quite otherwise. All contemporary history of the Russian activities in Manchuria points to the conclusion that their principal intention in acquiring this short-cut route to Vladivostok, and in acquiring the subsequent extension south to Dalny and Port Arthur, was mainly political and strategic. There was no intention to make the Chinese East-

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dinary words must be taken in an ordinary sense and technical words in a technical sense, and that doubtful sentences and expressions should be interpreted by the context, so as to make the treaty homogeneous and not self-contradictory". (Lawrence, T. J. *The Principles of International Law,* p. 287, 3rd ed. revised, 1906.)

As for the rule of restrictive interpretation of treaties, alleged by some writers as applicable to a case where a treaty in some way impairs the sovereignty of one of the parties, Dr. Lauterpacht, the Viennese publicist, has recently asserted that, while the "maxim of *in dubio mitius* is certainly a well-founded rule of private law, ... it is only a subsidiary means of interpretation, subject to the dominant principle which says that effect is to be given to the declared will of the parties and that the compact is to be effective rather than ineffective". He concludes that the alleged rule of restrictive interpretation in favor of the state whose sovereignty is impaired by a treaty is not a part of international law and that its adoption would be prejudicial to its very development. The decision of the Permanent Court of International Justice in the *Wimbledon Case,* as well as its advisory opinion relating to the Polish Postal Service in Danzig, would seem to support Dr. Lauterpacht's position. (Lauterpacht, H. *Private Law Sources and Analogies of International Law,* pp. 178 ff.)

The railway contract agreement above subject to analysis, however, is not, strictly speaking, a treaty.

ern Railway a profitable commercial enterprise, and, in fact, it never was until recently.

The Chinese intent, on the other hand, is not so clear. Naturally there was an effort to prevent the loss of administrative authority in the areas traversed by the railway, but there is reason to believe that the Chinese negotiators, following the ideas of Li Hung-chang, who was also the negotiator of the treaty of alliance which sanctioned the construction of such a railway, were more eager to insure the support of Russia in a possible conflict with Japan than they were to preserve special administrative rights in North Manchuria.[15] Nor were Chinese diplomats of the later years of the nineteenth century particularly well informed or meticulous about international legal terminology. The Russians wrote the railway agreement; Li Hung-chang accepted its clauses, including those indefinite ones which the Russians might have been expected to interpret broadly; and,

[15] For an account of the history and authenticity of this secret treaty of alliance of 1896, reference may be made to the writer's reference volume: *The International Relations of Manchuria,* Appendix A, pp. 253 ff. Sir C. MacDonald, the British Minister at Peking, on inquiring in 1899 as to whether or not a treaty of alliance actually existed between China and Russia, received a reply from the Tsung-li Yamen that the idea was "preposterous". However this may be, it was widely rumored that such an alliance did exist, and there is perhaps little justification for the statement, made frequently in recent years, that Japan had no knowledge of the existence of some form of treaty of alliance between China and Russia. (*China,* No. 1, 1899, No. 186, p. 123.)

after Li's departure for China, the Chinese Minister at St. Petersburg signed it.[16]

To rely exclusively upon the wording of the Manchurian railway contract convention of September 8, 1896, for evidence of the intent of either party is patently inadequate.[17] Justification for this assertion may be found in the circumstances which impelled Li Hung-chang to accept in the treaty of alliance a clause making such a railway concession a condition for Russia's support in the defensive alliance itself. Count Witte's memoirs give much evidence to show that Li accepted the railway agreement only after it was made clear to him that Russia considered such a railway short-cut across northern Manchuria absolutely indispensable—as Witte put it, an essential concession to make it possible for Russia to offer China, in another war against Japan, the military support which she desired. Troop move-

[16] Through Count Cassini's efforts at Peking, the treaty of alliance was ratified by the Chinese Government on September 30, 1896, three days before Li's return to Tientsin. (Bland, J. O. P., *Li Hung-chang*, p. 201.) Although it was bitterly opposed by members of the Tsung-li Yamen, the Empress Dowager seems to have overruled them. The railway convention had, of course, been negotiated by Li in St. Petersburg along with the treaty of alliance. A clause in the latter had provided that it was to go into effect only after the railway convention had been duly signed, i. e., in fact after September 8, 1896. (MacMurray, Vol. I, p. 81.)

[17] The eminent publicist, Professor T. J. Lawrence, writing of the subsequent Liaotung lease convention, offered a suggestive idea, applicable here: "As a rule words describe things. In diplomacy they are sometimes used to describe—well, other things!" (*War and Neutrality in the Far East*, p. 273.)

ments had to be facilitated. Without the railway short-cut that would have been impossible.[18] Li had sought to obtain Russian consent to Chinese financing of the proposed north Manchurian link in the Trans-Siberian. He seems even to have expressed his misgivings to Tsar Nicholas II, who seems to have expressed surprise at the veteran diplomat's suspicions of his country's motives.[19] Banquets and a bribe no doubt played a certain rôle toward making the avaricious Li Hung-chang more amenable to persuasion, but this veteran diplomat of China, the dean of them all, was too shrewd a statesman to be actually misled by Russian pretensions or fine phrases. A more likely explanation is that Li knew there was a price to pay for the alliance against Japan, and that that price was the sacrifice of certain of China's administrative rights in the Manchurian railway areas, at least temporarily.[20] That Li placed major emphasis on this secret treaty of

[18] *Memoirs of Count Witte,* pp. 89 ff.

[19] *Ibid.;* Bland, *op. cit.,* p. 200.

[20] I am inclined, therefore, to doubt whether the attempted exoneration of Li Hung-chang, made by Li Ching-mai, his son, while Chinese Minister at the Court of St. James, is entirely realistic. Banquets would hardly have had the effect of upsetting the brain of Li Hung-chang—whose triumphal tour of Europe and the United States thereafter exhibited him as one of the shrewdest statesman of the time, seeming half mystic, half sophisticate—and it is more likely that Li, while evidently cognizant of certain dangers to China's administrative integrity in northern Manchuria, believed some such sacrifice was necessary to obtain the alliance against Japan. Li Ching-mai's explanations only serve to strengthen the conclusion that the Manchurian railway concession, with all that it implied from its clauses, was the price paid for the alliance: "We will give you the use of our territory to build the railway on, and we will also

defensive alliance against Japan is evident from Witte's memoirs, Li Hung-chang's own statements in explaining his diplomacy in St. Petersburg, and the Empress Dowager's support of Li in securing ratification of the alliance by the Chinese Government.[21] The Empress Dowager evidently thought, even in 1900, during the Boxer Rising, that the Tsar was China's best friend: her telegram to Nicholas during July recalled the alliance to him.[22]

The sacrifices which Li Hung-chang was constrained to make in the Manchurian railway convention, which was actually negotiated by him, but which was not finally signed until after Li's departure from St. Petersburg, and then by the resident Chinese Minister, were evidently considered by Li to be none too great a price to pay Russia for such services as these: the intervention, along with France and Germany, to compel Japan to retrocede the annexed portions of southern Manchuria, including the Liao-tung peninsula, after the Sino-Japanese war;[23] the generosity of Russia in floating, with government

confer special rights of management on the railway company, but only as integral parts of a comprehensive defensive alliance, and we shall mete it out ungrudgingly. We allow you the use of our own land, you guaranteeing us the integrity of our Empire." What is meant by "the integrity of our Empire", to use Li Ching-mai's phrase, was evidently the empire as a whole with Japan as the imagined aggressor—an eventuality entirely predictable at the time in view of China's crushing defeat in the war of 1894-95. (Cf. The London *Daily Telegraph,* Feb. 15, 1910, p. 14.)

[21] Bland, *op. cit.,* pp. 200 ff.

[22] *Vide:* Bland, *China under the Empress Dowager,* p. 336.

[23] Sir C. MacDonald, British Minister at Peking, in a private letter to Lord Charles Beresford, dated November 27, 1898, empha-

guarantee, loans in France to offer cash to China to pay the first instalment of the war indemnity required by Japan;[24] and, last, but not least, the alliance itself, in which Russia explicitly designated Japan as the object of this *entente* with China. Li was most adept at playing one state off against another. He evidently felt that the concessions to Russia in the railway areas were, at all events, but temporary: there might be opportunities afforded later for checking Russia. The very concessions were such as to strengthen the strategic position of Russia, which was, as a matter of fact, from the point of view of Li Hung-chang, a desirable off-set to possible Japanese aggression in Manchuria.

In view of these circumstances surrounding Li Hung-chang's negotiations in St. Petersburg in 1896, it does not come as so much of a surprise that the Chinese text failed to include the clause in Article 6 which, as a matter of fact, was the principal source of the Russian claim to exercise exclusive administrative authority of a political nature in the railway

sized at least this one point when he tersely explained the motives which impelled China to grant this railway convention: "The Manchurian Railway Concession dates from 1896. As is well known, it was obtained as recompense for help given in securing the retrocession of Liaotung." (*China* No. 1, 1899. No. 459, Enclosure 2, p. 341.) "Emperor William was the soul of this hybrid combination, in which France only joined half-heartedly, Russia more or less unconsciously, and from which England prudently withheld." (*Recollections of a Foreign Minister* [Memoirs of Alexander Isvolsky], Ch. II.)

[24] *Memoirs of Count Witte*, pp. 90-91. *U. S. Consular Reports*, Oct. 1895, No. 181, p. 198. Baron Korff, *Russia's Foreign Relations during the Last Half Century*, p. 56.

areas. This clause, which has never been denied validity officially by the Chinese Government, was kept secret from other powers by the Russian Government until, during the Harbin municipality controversy, it was revealed by Minister Pokotiloff at Peking in 1908. Its importance is paramount, and may well be considered in greater detail later, after some analysis has been given of the other clauses of this railway convention, which is, to repeat, the rock on which subsequent Russian administrative enterprises in the Chinese Eastern Railway areas were constructed.

The Li-Lobanoff treaty of alliance against Japan, which made the railway contract a condition of its enforcement, like all such treaties of bilateral alliance, naturally contained a clause rendering lip-service to the high motives of Russia in preserving China's territorial integrity: "The junction of this railway with the Russian railway shall not serve as a pretext for any encroachment on Chinese territory, nor for any infringement of the rights of sovereignty of His Majesty the Emperor of China."[25] There is, however, no such general reservation in the Manchurian railway convention itself. Two articles of the railway contract agreement of September 8,

[25] MacMurray, Vol. I, p. 78. This gives an alleged text of the treaty of alliance, as disclosed by Li Ching-mai in The London *Daily Telegraph*, February 15, 1910. Its substantial accuracy has now been established beyond question. This clause is not contained, however, in the telegraphic summary of the treaty which was submitted by the Chinese delegation to the Washington Conference. (*Vide: Conference Proceedings*, p. 1414.)

1896, did, however, provide for limitations upon the Russian exercise of administrative authority. Article 5 provided that the Chinese Government were to assure the safety of the railway against any attack, though it was not textually declaratory of the then existing general administrative rights of the Chinese Government in such matters as municipal administration, taxation or transference of land titles. It was declaratory, however, of a general police authority, but one which was apparently limited to guarding the railway against external attack; that is, of bandits who at that time roamed the entire territory of North Manchuria. The Russian administration in the Chinese Eastern Railway subsequently referred to the clause in the railway statutes which provided that " the preservation of law and order on the lands assigned to the railway and its appurtenances shall be confided to police agents appointed by the Company ".[26] This conferred no rights upon the Russians, or the railway, however, because this was not an international agreement at all, but a unilateral attempt on the part of Russia to claim jurisdiction under the railway statutes which were, as a matter of fact, drawn up in accordance with Russian law and were, therefore, without force as binding China. One should, therefore, regard these statute provisions as containing only administrative provisions without international legal significance in providing criteria for interpreting the relative rights of China and Russia.

[26] MacMurray, Vol. I, p. 86, gives the text of the statutes.

There was, however, in this Article 5 of the railway contract agreement of 1896 an additional provision to the effect that all cases of a judicial character, criminal or civil, arising upon the railway territory, were to be adjudicated by the local authorities. The reference to "local authorities" may be interpreted as meaning the Chinese local authorities. This reservation, however, was, of course, only partially applicable to the Russians themselves, for their general extraterritorial treaties with China were applicable, and these permitted Russians, whenever they were defendants in a civil suit or accused in a criminal proceeding, to be tried before courts of their own nationality. The provision, if enforced, would, nevertheless, have exempted Chinese, whether employed by the railway company or not, from the jurisdiction of the Russian courts whenever they were defendants, or whenever the case involved only Chinese litigants.

The other article which constituted a limitation upon the Russian rights was that which (Article 8) provided that the Russian troops were not to be stationed along the railway on any pretext whatsoever. They were permitted to use the railway as a means of through transport, but not to remain along the line itself.[27]

[27] "The Company is responsible that the Russian troops and war material, despatched in transit over the line, will be carried through directly from one Russian station to another, without for any pretext stopping on the way longer than is strictly necessary." (MacMurray, Vol. I, p. 76.) This was a corollary of a clause in the treaty of alliance of the same year.

Judging the railway agreement from its own contents, then, it is evident that it contained no general reservation of all administrative (in a political sense) rights by China, and that the provisions with respect to police rights were extremely indefinite. It is necessary, then, to examine the agreement to ascertain whether specific administrative or police rights were elsewhere contained which conferred them on the Chinese Eastern Railway authorities, or, in other words, upon the Russians.

Turning to the positive grants of administrative authority to the Russian railway authorities, then, one is struck with the absence of specific provisions conferring rights on Russia—unless the clause in Article 6 of the French text, giving a blanket grant of " absolute and exclusive administration ", is considered.[28] Unless the French text were to be considered of binding effect, therefore, the Russians could claim no right to establish municipal administration, for example, in the railway areas. This raises a very strong presumption that the secret clause in Article 6 was understood by the Russians to confer the blanket authority which they soon claimed in fact along the railway line. It is quite evident that such authority was not conferred in the other portions of Article 6 which provided merely for commercial management of the railway system, and gave the company the right to acquire lands

[28] " La Société aura le droit absolu et exclusif de l'administration de ses terrains." (MacMurray, Vol. I, p. 76; Wang, Vol. I, p. 1 ff.)

necessary for the use of the line, lands for a telegraph line, workshops, stations and the like, and for acquiring construction materials, such as sand and rock, for the roadbed.[29]

The determination of the extent of Russian political administrative rights in the Chinese Eastern Railway areas depends, then, on two principal points: (1) whether the clause contained in Article 6 of the French text was enforceable; and (2) whether, if enforceable, it was sufficient in itself to establish a claim to general political administration in the railway areas.

As to the first question, it would seem entirely reasonable to conclude that the additional clause in Article 6 of the French text was, in fact, enforceable, and that its non-inclusion in the Chinese text was of little or no legal significance. There has never been an official assertion on the part of either Li Hung-chang or the Chinese Government since his time that the Russians surreptitiously inserted such a clause in their own text of the agreement. In short, the enforceability of the clause has never been denied by the Chinese Government.[30] It is this fact which must

[29] *Vide:* MacMurray, Vol. I, p. 76.

[30] This clause is included in the French text of the railway contract agreement as printed in the official Chinese Government publication here noted: Wang, C. C. *Railway Loan Agreements of China*, Vol. I, pp. 1 ff. This was published by the Chinese Ministry of Communications, Railway Department, Peking, in two volumes, November 11, 1921. No explanation is given of the reason for the exclusion of the clause from Article 6 of the Chinese text, which is also printed here, along with the French text.

lead the student who seeks realism to conclude that the concealed clause was actually well-known to the Chinese Government in 1896, and that, for reasons their own, they omitted it from the text which they kept concealed from other powers officially until the Washington Conference in 1922. It is probable that Li Hung-chang saw fit to exclude this clause from the text of the railway convention which was presented to the Empress Dowager, and perhaps to others in the Tsung-li Yamen who were known to be his political enemies, in order to secure ratification of the convention as an indispensable condition of the treaty of alliance with Russia. The Russian Government, too, concealed the clause until 1908 when Minister Pokotiloff in Peking revealed it as the real justification for Russian assumption of administrative authority in the Chinese Eastern Railway areas, especially in the railway municipalities, as at Harbin. It is noticeable that the Chinese Government, while protesting at this time against the Russian interpretation of the clause itself, actually must be said to have officially accepted it as an actuality. Prince Ch'ing, in his statement of the Chinese case on February 18, 1908, did not deny the existence of the concealed clause, but asserted that other provisions in the agreement, notably in Articles 5 and 6, were to be construed as modifying that general grant.[31] Nor was this clause of the French text of

[31] *U. S. For. Rels.*, 1910, p. 203. Statement given by Prince Ch'ing to American *Chargé* Fletcher, Peking, February 25, 1908.

Article 6 denied by the Chinese delegation at the Washington Conference when a telegraphic summary of the treaty of alliance was presented to the conference.[32] The fact of concealment by the Russian Government until 1908, very probably out of deference to the wishes of the Chinese Government in order to satisfy a home situation envisioned by Li Hung-chang, or perhaps to prevent its duplication by other states desiring to negotiate railway agreements with China, can have had no effect by way of vitiating its effectiveness.

Turning, then, to the clause in question in the French text, the question is whether that clause, in the absence of any other such provision, was sufficient to warrant a Russian claim to general political administrative rights in the Chinese Eastern Railway areas. Fortunately, the clause is brief: "*La Société aura le droit absolu et exclusif de l'administration de ses terrains.*" Moreover, its terminology permits of but one translation: "The Society shall have the absolute and exclusive right of administra-

[32] *Conference Proceedings*, p. 1414. Under these circumstances, I cannot accept the statement of Mr. Lancelot Lawton that "the discrepancy between the French and Chinese texts in their relation to Article VI provides in itself sufficient warrant for challenging the Russian attitude". (*Empires of the Far East*, Vol. II, p. 1303.) Lawton did not, however, doubt the existence of the clause in the French text. Mr. E. J. Harrison accepted the validity of the clause in question and pointed to it as the principal source of the Russian claim, concluding that "in a strictly legal sense, China had a very weak case", referring here to the Harbin situation in 1909. (*Peace or War East of Baikal?* pp. 197 ff.)

tion of its lands." Its interpretation turns, in the main, on the meaning of the word "administration". It has been contended officially that the term "administration" in the usual French meaning refers to "management" or "direction" and that these are generally to be interpreted in a non-political sense; that they refer, then, to commercial management of the railway. However much this interpretation may have been resorted to by one state or another to justify its diplomatic attitude toward the question, I find no justification for it. The term "administration" in French is as frequently used, without qualifying adjectives, to refer to political administration, as characterizing such powers as tax collection and police, as it is to commercial regulation. "Maladministration", for example, obviously is frequently used in French to describe bad political administration. This would be too simple to emphasize here, were it not for the fact that this specious argument has frequently been applied to this vital question of the Russian rights in the Chinese Eastern Railway areas—especially during the dispute over their establishment of a municipal administration in Harbin and such cities additionally as Tsitsihar.[33]

[33] In a *note verbale* of the Department of State presented to the Russian Embassy at Washington on Nov. 6, 1909, at the time when, in defense of the position taken by American consul, Mr. Fred D. Fisher at Harbin, China, the American Government were protesting the right of the Russian railway administration to establish a municipal administration at Harbin, the following statement may be found: "As to the meaning of this word 'administration', it seems very worthy of remark that in English the word 'administration' is

But, while the term "administration" *may* be used in a distinctly political sense, there is no reason to suppose that it *must* be used in that sense in the questionable clause of Article 6 of the 1896 railway agreement. Three factors, however, must be taken into consideration before it can be concluded that in this instance it *cannot* be so interpreted. First, the term is qualified by the adjectives "absolute and exclusive"; second, it is found in an article which for some reason was concealed for twelve years; and third, it must be interpreted together with the general character of the whole agreement.

As for the term "absolute and exclusive" the opinion is ventured that, in their particular context, they do refer to some form of political administration. They are found in a clause of Article 6, which article refers solely to the "lands actually necessary for the construction, operation and protection

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quite commonly used of all sorts of business administration, while the same word in French and the equivalent word in the Chinese version of the contract [of 1896] are still more commonly used of business and non-governmental administration. Indeed, the French word 'administration' is so very commonly used of business management, that its absolute meaning in a given case would be wholly determined by the context. A reading of the whole context deprives the second paragraph of Article VI of all semblance of referring to a political administration." (*U. S. For. Rels.*, 1910, pp. 219-220.) A careful reading of this statement of the Department of State reveals that the department did not go so far as to deny that the term "administration", whether in the English or French languages, was not commonly used to refer to political or governmental administration. It is worthy of remark, too, that on one point the department was distinctly in error; there was no "equivalent word" in the Chinese text because this particular clause was not contained in the Chinese text at all.

of the line " and necessary, therefore, as is explicit in the article, for acquiring construction materials as for roadbed and maintenance. If they referred solely to management or operation authority, in the usual commercial sense, there would be no purpose in including in another article, the twelfth, a specific provision to the effect that " the complete and exclusive right to operate the line " should belong to the Company. It may be concluded, therefore, that these qualifying adjectives, " absolute and exclusive ", did establish a form of political authority for the Company over the lands actually necessary for the operation and protection of the line. They do not suggest, however, any political administrative rights beyond that, and do not clearly justify the establishment of municipal administration in large tracts patently not necessary for conducting the railway as a commercial enterprise.

Moreover, this questionable clause was concealed for a period of twelve years until revealed by Mr. Pokotiloff, the Russian Minister at Peking, in 1908. The reasons for concealment for twelve years have already been suggested. Under the circumstances, its very concealment, and its revelation at a time when the Russians felt obliged to justify their actions to outside states, creates a clear presumption that it was not understood by either the Chinese or Russian signatories of the original agreement to be just another clause bearing on commercial management. Had it been such there would have been no

purpose for concealment at all. The very fact, then, of its being kept secret for so long a period raises a strong presumption in favor of an interpretation of it which would give it political significance.

Finally, when this controversial clause is interpreted in the light of the general terms of the entire railway agreement of 1896, it seems to imply a *limited political grant,* one which falls short of being equivalent, as its terminology might seem to imply, to a general grant of political administration in the areas not required for the use of the railway itself. If it were meant to grant an unlimited right to exercise jurisdiction and to establish police agencies over the entire railway system, including municipal settlements, it would have had to stand alone as a separate article, or to have been described by a statement of specific rights illustrative of its meaning. The fact is that neither text contains any detailed grant of political authority to the Russians, i. e., to the railway authorities. Such references to political administrative authority as are included in each of these texts refer to powers either reserved to or declaratory of the Chinese sovereign rights of administration.

This questionable clause, therefore, appears to be an exception, and as such deserves to be interpreted along with the other articles of the agreement. The conclusion would seem to be that this grant of " the absolute and exclusive right of administration of its lands " to the railway company, i. e., to the Russian

management, warranted the establishment on the part of the company of some form of political control over such lands as were actually necessary for the company to use for its establishment as a transportation system. As to just what form of political authority may reasonably be assumed there is room for question. Evidently not the right to levy taxes anywhere, nor the right to establish courts of law. The latter was specifically reserved to the Chinese local authorities.

One specific grant to the Russian railway administration is particularly puzzling: the grant in Article 6, contained in each of the texts, to enable the railway to acquire lands actually necessary, not only for its construction and operation, but for its *protection*. Was it justifiable, on the strength of this article, for the Russians to have established a system of *police administration* by means of so-called "railway guards" over the entire territories attached to the railway company? Protection would seem to mean merely the right to police the physical properties of the railway itself. Banditry, however, contrary to uninformed and propaganda statements of that time, was very prevalent throughout North Manchuria.[34] But, in so far as the Russians were

[34] Aside from the banditry prevalent during the Boxer Rising in 1900, which put part of Manchuria in as much turmoil as was Chihli province, periodic forays of brigands, the well-known Manchurian "hung hu-tzu" or "red beards", along the Chinese Eastern Railway were common from the beginning of its construction until the eve of the war with Japan. Mr. H. J. Whigham, whose book on Manchuria published in 1904 is a mine of interesting information as to the

given a right to patrol the line with their own " railway guards " it was a qualified right. Article 5 of the 1896 agreement obligated the Chinese Government to " assure the safety of the railway and of the persons in its service against any attack ". It appears, then, that if the agreement of 1896 had been observed according to its letter there should have been a police patrol or railway guard which was either international, composed of Chinese and Russians, or else there should have been a clear-cut delimitation of the authority of two such police forces in the railway areas, the Russian force to be composed of only civilian police.

Neither the 1896 nor the 1898 agreement pertaining to the Chinese Eastern Railway specifically mentions " railway guards " at all. Inasmuch as it was the stationing of Russian so-called " railway guards " all along the line which, along with the assumption of municipal administrative authority in the railway " settlements " was the principal object of the Chinese official protests, and of continual friction with the local authorities, it is noteworthy that no such special institution was provided for in

real conditions in Manchuria before the war with Japan, went on a mission to suppress such brigandage, and contrary to his expectations he was compelled to remark: "I confess that I was surprised to find how prevalent the Hun-hu-tzes really were". (Whigham, H. J. *Manchuria and Korea,* Ch. VII "Fighting the Brigands".) He referred to South Manchuria. Mr. A. Hosie, however, writing of this pre-war period in his pioneer and authoritative volume on Manchuria, describes in detail the prevalence of brigands in North Manchuria along the railway line. (Hosie, A. *Manchuria,* Cf. Index.)

the railway agreements with China. As for stationing of regular troops along the railway, that was specifically prohibited in both the treaty of alliance and the railway agreement of 1896. Consequently, the Russians circumvented this provision by placing special arm-bands and collar insets on the regular troops and calling them "railway guards". By 1903, in addition to perhaps somewhat less than 100,000 regular soldiers, these so-called railway guards numbered about 20,000.[35]

[35] Weale, B. L. P. (Lennox-Simpson), *Manchu and Muscovite*, pp. 471, 495, 545; Witte's *Memoirs*, pp. 110-114; *Baron Rosen*, Vol. I p. 201; General Kuropatkin, *The Russian Army and the Japanese War*, Vol. I, p. 155.

Before the Boxer Rising the Russian Government maintained that these railway guards were not regular soldiers but simply railway police, employed and paid by the Chinese Eastern Railway. The British Government seem to have conceded to the Russians the right to station such railway guards along the Chinese Eastern, as the following quotation indicates: " . . . . The right to have such military police has been accorded to the Railway Company by the Chinese Government, and it is difficult to see on what grounds we can now object." Sir C. MacDonald, Minister at Peking, to the Marquess of Salisbury, the Foreign Minister, December 3, 1899. (*China*, No. 1, 1899, No. 469, p. 353.)

CHAPTER II

Early Development of the Russian Position: 1898-1909

1. The De Facto Assumption of Administrative Authority by The Russian Railway Management. Two factors, at the outset, served greatly to strengthen the actual Russian position between 1898 and 1904. Much of what transpired locally in Manchuria in the relations of the Russian railway officials and the Chinese administrative authorities was with the tacit approval or complete connivance of those local Chinese gentry. In the second place, the anti-foreign outbreaks and unsettlement in Manchuria, as elsewhere in China, consequent upon the Boxer Rising in 1900, gave the Russians some color of justification for temporarily undertaking to protect their vested proprietary interests in the Chinese Eastern Railway by stationing "railway guards" or even regular troops at points subject to attack or disorder from the Boxers or other fanatics and brigands. This is not to say that the Boxer Rising at all justified the saturation of Manchuria, even at points many miles from the railway line, with Russian troops, particularly to the number of nearly 100,000 in the halcyon days of Russian rule in Manchuria from 1901 to 1903.

As to the first point, the connivance of the local Chinese authorities, there is much evidence to show that here, as in so many instances in the foreign relations of China during this period, they acted largely from provincial and personal motives to the great embarrassment of the central government in Peking. There was, for example, the case of the Russian high diplomatic officer who was assigned to Mukden early in 1903 to represent the Tsar. He ranked with a consul-general and served as such and as a diplomatic envoy of the Tsar at Mukden, at the same time being appointed by the local Tartar-General at Mukden as his personal adviser. He established headquarters in a segregated Russian community outside the Chinese city and surrounded himself with a goodly contingent of so-called "railway guards".[1] At Harbin, too, the high Chinese officials freely fraternized with the Russian railway men and actually connived with the Russians in their scheme of expropriating as much land as possible for the use of the railway.[2] These local Chinese dignitaries were, in fact, dictated to by the Russian railway administration.

The inevitable followed. Taking the prevalence of banditry along the railway as a pretext for stationing regular troops, called "railway guards", at points on both the main and the southern branch line, the Russians established a precedent especially

[1] Consul Miller (Newchwang) to Minister Conger (Peking), March 5, 1903. (*U. S. For. Rels.*, 1903, p. 49.)

[2] Miller to Conger, March 21, 1903. (*Ibid.*, pp. 52-53.)

during the Boxer Rising which was not easy to alter. The first sod for the construction of the Manchurian short-cut to Vladivostok was broken during August of 1897, less than a year after the signing of the contract agreement. The whole line had to be completed under the agreement in six years. Actually, in spite of the Boxer Rising, it was finished, as far as rail-laying was concerned, by the end of 1901.[3] By 1903 the entire line was in running order, five and a half years, that is, from the signature of the agreement. In the meantime, following the occupation of the Kwantung leased territory in 1898 in pursuance of the lease convention with China of March, and in accordance with the new 1898 agreement for the construction of the southern branch from Harbin to Port Arthur, this branch line had also been completed, having been linked in its northern and southern sections, just south of Kuanchengtzu (near Changchun), on July 18, 1901.

The flooding of Manchuria with Russian regular troops, however justified by the uncertainties attending the Boxer Rising, was without specific sanction of any kind in the treaties and agreements with China. The appointment of Admiral Alexeieff in 1900 as commander-in-chief of the land and naval forces of the Tsar in the Far East, and his elevation to the dignity of occupant of the "Imperial Lieutenancy of the Far East" in 1903 evidenced the eclipse of the moderate party in the Tsarist counsels

[3] Whigham, *op. cit.*, pp. 49, 57; Hosie, A. *Manchuria*, p. 50.

which had been dominated by Count Witte. Alexeieff was an imperialist of aggressive calibre and it was largely his influence that made the evacuation of occupied towns in Manchuria, following the Boxer Rising, more nominal than real in fulfilment of the evacuation agreement of April 8, 1902, with China.[4] Evacuation meant either withdrawal a few miles from the occupied points or putting of green shoulder-straps, collar patches and arm-bands on the regular Russian soldiers. The Russians constructed some eighty *dépôts* along the entire railway system to house the " railway guards ", the one at Mukden large enough to accommodate 6,000 men. By the end of 1903 these " railway guards " numbered somewhere between twenty and thirty thousand.[5] Their name was changed to " protecting guards " (*Achranie Straja*) to describe their presumed purpose of protecting the railway, when, as a matter of fact, there was less necessity for such protection in 1903 than in 1900. They were Cossacks, well-trained, well-

[4] The London *Times*, Oct. 22, 1902. The North China correspondent, Dr. Morrison, who was well acquainted with Manchurian conditions wrote: "In every case evacuation means the removal of Russian troops to a point from which the city evacuated can be struck immediately and without resistance. Manchuria is absolutely dominated by Russia. All of the officials are absolutely in her power; none can be appointed without her approval; and evacuation cannot alter a domination which is fact becoming as effective as that of England over the Native States of India. All the water-ways are controlled by Russia and so they will be after the evacuation."

[5] Weale, B. L. P. *Manchu and Muscovite*, p. 545; Asakawa, K. *The Russo-Japanese Conflict*, p. 235. Baron Rosen, *op. cit.* Vol. I, p. 201. *China* No. 2 (1904), *British Parl. Papers*, p. 47.

equipped, well-paid and largely recruited as a " volunteer force " from the regular army. Eight thousand of such troopers should have been ample to protect the entire railway line, according to Mr. Whigham who travelled extensively in Manchuria between 1901 and 1904.[6] By the winter of 1903 the war with Japan was inevitable for, under the rule of Alexeieff, the Tsarist Government had fixed upon a still more aggressive policy.

For months Prince Ch'ing at Peking had refused to grant the Russians a blanket right to station " railway guards " along the line of the Chinese Eastern. The evacuation agreement of April 8, 1902, made no mention of such " railway guards " but contained a provision whereby China, in accordance with the terms of the 1896 railway agreement, should " secure within the borders of Manchuria the safety of all Russian subjects in general and the undertakings established by them ".[7] But it went further by making evacuation conditional on the ability of the Chinese authorities to prevent the occurrence of disturbances in the future. The joker, however, was in still another clause whereby the Russian Government reserved the right to determine how large a Chinese force might be stationed in Manchuria. Russian diplomacy took care to make evacuation conditional upon the maintaining of order in Manchuria,

[6] Whigham, *op. cit.*, p. 116.

[7] MacMurray, Vol. I. pp. 326-329. *Vide: China*, No. 2 (1904), *British Parl. Papers*, p. 5.

and then made certain that that condition would, in future, be impossible of fulfilment.[8]

In view of the repeated protests of Prince Ch'ing to Mr. Pokotiloff, Russian Minister at Peking, during 1902, it is impossible to agree with the statement of Dr. K. Asakawa, the unusually impartial Japanese scholar who wrote of the causes of the Russo-Japanese war, that " China does not appear to have questioned at any time before the war Russia's right, as such, to detail the railway guards ".[9] Not until after the Russo-Japanese war does it appear that the Russians were given clear sanction to their claim to station so-called railway guards along the Chinese Eastern Railway. But, though China was obligated under the evacuation convention to " protect the railway ", she was to do this apparently without the right of establishing a police force within the lands designated as appertaining to the Chinese Eastern Railway itself.[10] This was clearly an impossibility. As far as the letter of the agreements are concerned, what Russia acquired was nothing but a right to prevent the institution of a Chinese police force in the railway's lands; not the right to establish a system of " railway guards " on her own account. Anomalous as this may seem, in the absence

[8] Dr. K. Asakawa, who wrote of this period with commendable fairness to Russia, declared that the suppression of banditry was practically impossible on the part of the Chinese " so long as the Russian forces kept the Chinese troops greatly reduced in numbers ". (Asakawa, *op. cit.*, p. 227.)

[9] Asakawa, K. *Yale Review,* Aug. 1908, p. 195.

[10] MacMurray, Vol. I, pp. 327-328.

of any positive and new grant to the Japanese after Portsmouth, it would have left the Japanese with a very questionable right to patrol the South Manchuria Railway areas with Japanese railway guards.

To conclude the account of the *de facto* assumption of authority of Russia in the Chinese Eastern Railway areas before the Russo-Japanese war mention may be made of local situations, as at Harbin, where the Russians acquired large tracts of land ostensibly for the use of the railway and administered them with or without the approval of the local Chinese authorities. Harbin was a boom-town, non-existent in 1897, except for a small Chinese village on a site removed from " Old Town " where the Russians built their first railway settlement. By 1903, however, having discovered when the Sungari river resumed its normal course after floods that " Old Town " was several miles from the river, the construction of " New Town " on the river's bank had begun.[11] There were 12,000 Russians in Harbin in 1901; five times that in 1903.[12]

The Russian position at Harbin during 1900 and until the war with Japan was well described by Mr. H. B. Miller, consul of the United States at Newchwang who sent frequent reports to the State Department on the situation in North Manchuria. The Russians practically managed all local political affairs in all the lands expropriated for the use

[11] Weale, B. L. P., *op. cit.*, Ch. VIII. " Harbin, The Railway City "
[12] *U. S. Consular Reports*, April, 1904, No. 283, p. 2.

of the railway. None but Chinese and Russians could lease land from the railway company in the areas thus demarked. The chief railway engineer of the Chinese Eastern was in supreme charge of municipal administration until the war broke out. Foreigners were permitted within the railway areas only on sufferance.[13]

Russian troops were quartered indiscriminately in each of the three " towns " of Harbin, and to Mr. Whigham, the British correspondent who visited the city in 1903, " the one striking feature of the place to the outward eye was the absence of the Chinese element ".[14] Aside from the laborers employed by the railway, Harbin appeared to him to be " an entirely Russian settlement of the military kind ". Mr. Whigham, like so many other foreigners, found that the Russians insisted on a Russian visa to foreign passports—a situation which revealed the extent of their *de facto* authority. There were no foreign consuls at Harbin before the Russo-Japanese war, and the Russian Government went so far as to declare that no consuls might be permitted to reside at Harbin without Russian consent.[15]

As for judicial authority in Harbin, and in the Chinese Eastern Railway areas in Kirin and Heilungkiang provinces, there was but slight legal basis for the assumption of broad powers by the railway au-

[13] *U. S. Consular Reports,* April, 1904, No. 283, p. 2.

[14] Whigham, *op. cit.,* pp. 75 ff.

[15] *U. S. For. Rels.,* 1903, p. 711. *China,* No. 2 (1904), *British Parl. Papers,* pp. 79, 81.

thorities. Two new agreements pertaining to jurisdiction over Chinese in the railway areas, one for Heilungkiang and one for Kirin, were negotiated in May and July, 1899. Intrinsically, they are both anomalous, being replete with clauses which could not have practical application. Their intent was clear, however, for they were imposed upon the local Chinese authorities who signed them, the Russian intent being to bring all important cases, whether civil or criminal, to trial in Harbin where the decisions could be influenced or dictated by the engineer-in-chief of the railway. Generally speaking, these agreements provided that in all cases arising which directly or indirectly affected the interests of the railway they were to be tried in a specially constituted Chinese Department of Foreign and Railway Affairs in Harbin. This was to be presided over by high Chinese officials, but the Russian engineer-in-chief could " advise " what should be the disposition of any case, and that *advice* was to be decisive.[16] This was, therefore, but a formal document intended by the Russians to give the color of right to authority which, in any event, they were already assuming.

On August 2, 1901, Tsar Nicholas II by imperial ukase promulgated regulations for judicial procedure in the so-called " zone " of the Chinese Eastern Railway.[17] It provided for a detailed system of lower and higher courts with appeal from the jus-

[16] MacMurray, Vol. I, pp. 274, 277, 321.
[17] *Ibidem*, Vol. I, p. 88.

tices of the peace to the district courts. One higher court, however, was established at Harbin with jurisdiction superior to all the other Russian courts in North Manchuria. There was no legal justification for such a court system in the Chinese Eastern Railway area. This was pointed out by American Consul Miller to Minister Conger in Peking in a communication of March 17, 1903, to which the latter replied on March 24 that it was quite evident that Russia had no right to establish courts of her own outside treaty ports or the Kwantung leased territory.[18] Harbin had not been opened to foreign trade as a treaty port and no foreign consuls resided there before the Russo-Japanese war. The Russian action in establishing this judicial system was in direct contravention of Article 5 of the original railway agreement of 1896 which specifically provided that all judicial cases should be tried by the local Chinese authorities. The local arrangements made in 1899 could not have the force of a formal agreements to which the central Chinese Government were a party. Finally, it should be noted that these local agreements, in any event, had no application to Fêngtien province, and therefore had no bearing, even if valid *per se,* on that portion of the Chinese Eastern Railway which later became the South Manchuria Railway. Except for a few miles, the South Manchuria is entirely in Liaoning (Fêngtien) province.

[18] *U. S. For. Rels.,* 1903, pp. 50-51.

2. Later Interpretation of the Russian Rights: The Harbin Municipality Question. Although only such jurisdictional rights as Russia possessed in the Chinese Eastern Railway areas before the treaty of Portsmouth were transferred to Japan by that treaty and by the Sino-Japanese treaty of Peking of December 22, 1905, that is, of course, for the southern portion of the railway, there arose a group of questions after the war pertaining to municipal administration in the various cities along the Chinese Eastern in northern Manchuria which throw considerable light on the real character of the Russian rights before 1905. Moreover, the question of interpretation of the Russian rights in the railway areas, although only indirectly to be taken as interpretative of the Japanese rights in the South Manchuria Railway areas, vitally concerned the Japanese Government in their policy of establishing municipal functions in the areas under their control.

Until 1909 the Russian Government, acting through the Russian administrative authorities in the Chinese Eastern Railway Company, continued to exercise the principal functions of municipal administration, including police and tax collection, in numerous so-called "railway settlements" along the line, particularly at Harbin. Russia had withdrawn her troops in accordance with the evacuation agreement signed with Japan after Portsmouth. She continued, however, to maintain a certain number of "railway guards" along the Chinese Eastern. In

1907 the newly established viceregal administration in Mukden, under Hsü Shih-chang, sent Chinese police to the railway towns. This precipitated a controversy over the right of the railway to station their own police, one, however, which was soon confused, without definite decision, in the more immediate issue of municipal administration generally.

The broad issue of the railway's right to establish its own municipal system in the railway areas, particularly at Harbin, had not arisen before the war because of China's preoccupation with more vital questions and the absence of foreign consuls in North Manchuria. Harbin was dominated by the Russians, there being but few other foreigners there between 1898 and 1907. The first foreign consul, other than the Russian, to be sent to Harbin was an American, Mr. Fred D. Fisher, who had instructions not to consent to the Russian demand that foreign consuls receive their permission to reside in these railway cities from the Russian Government. Consequently, during the three years that followed, the American Government was drawn into this Sino-Russian controversy over jurisdiction.

In 1907 the Russians in charge of the railway established their own municipal council in Harbin, at the same time drafting regulations for similar Russian-composed councils at other places, notably Hailar. On January 27, 1908, the newly established Chinese Board of Foreign Affairs protested that such action was contrary to the 1896 railway agree-

ment which did not confer on the railway the right of municipal administration of its lands. The railway authorities rejected the protest. Counter protests followed, the Chinese Government circularizing the foreign ministers in Peking as to their case on February 25.[19] Throughout the year this controversy continued, the railway authorities levying municipal taxes at such places as Harbin, Manchouli, and Hailar.

The Russian Government had so far justified their claim for establishing municipal administrative agencies under the railway's direction by pointing to Article 6 of the 1896 railway agreement which authorized the Chinese Eastern Railway Company to acquire lands necessary to the operation of the line and for the erecting of telegraph lines. When Prince Ch'ing protested in February of 1908, however, Mr. Pokotiloff, the Russian Minister, produced the hitherto concealed clause in the French text which gave the company "absolute and exclusive right of administration of its lands". Prince Ch'ing, however, directed attention to Article 5 of the 1896 agreement, asserting that this stipulation that China was to protect the railway was sufficient evidence that China had never waived any right of political jurisdiction in favor of the railway company. On February 18, 1908, Prince Ch'ing pre-

[19] Hsü, Shu-hsi, *China and Her Political Entity*, pp. 301-302. *U. S. For. Rels.*, 1910, p. 203.

sented to Minister Pokotiloff at Peking the following interpretation of the Chinese contention: [20]

"The words 'lands required by the company', as used in Article 6 of the agreement [of 1896], mean only the land actually required for the use of the railway. Thereon the company may erect any buildings and may establish a telegraph line, worked by the company, for the company's use; but as regards the matter of protection of the land and maintenance of the peace thereon, the authority for that rests in the hands of the Chinese officials, as witness Article 5 of the agreement, which plainly stipulates that 'the Chinese Government will take measures for the protection of the line and of the men employed thereon'; and, further, 'all crimes and law suits arising on the land of the company will be dealt with by the local officials in accordance with treaty'.

"From this it may be seen that the authority to administer the lands rests entirely with China. There can be no doubt about it whatever. Therefore the action of the railway company in instituting municipal administrations at any of the various places on the line is evidently an usurpation of China's sovereignty, and it is absolutely impossible for the board of foreign affairs to recognize their rights in so doing."

The railway administration, however, continued to exercise municipal functions along the Chinese Eastern in pursuance of the company's regulations. These regulations, in effect during February of 1908, provided that all foreigners, as well as Russians and Chinese, must sign an agreement to obey the company's municipal regulations as a condition of acquiring the right of residence or property holding

[20] *U. S. For. Rels.*, 1910, p. 203. Copy from Prince Ch'ing to Mr. Fletcher, U. S. *Chargé des affaires* at Peking, Feb. 25, 1908.

in the railway's areas. Specifically, they had to obey all police, sanitary and trade regulations; pay all taxes levied by the railway authorities; and forfeit all right to recourse, whether at law or by invoking the diplomatic support of their respective governments, to contest the enforcement of these regulations—a sort of Calvo clause.[21] A system of fines and alternative imprisonment was announced by the railway authorities on February 10, 1908, in case of failure to comply with the above regulations.[22]

The outcome of this controversy was a Sino-Russian agreement of May 10, 1909, which, while evidencing a considerable alteration in the Russian position, still insured the railway officials a decisive voice in municipal matters at Harbin as elsewhere in the railway towns. The agreement was negotiated in Peking by Major General Horvath, general manager of the railway, who, after the removal of the Russian consul from Harbin, had himself become acting consul. As General Horvath had been the strongest advocate of a policy of claiming sole jurisdiction for Russia within the railway areas, it was evident that such concessions as were contained in the agreement were largely the result of his endeavor to conciliate the foreign governments whose consuls at Harbin, notably the German and American, refused to accept the railway's claims largely on the ground that they constituted a violation of

[21] Regulations printed in: Lawton, *op. cit.*, Vol. II., p. 1302.
[22] *Ibidem*, pp. 1302-1303.

the extraterritorial rights of foreign nationals. The agreement itself provided that, " as a matter of fundamental principle the sovereign rights of China are recognized on the lands of the railway company " —a concession *in principle,* the effect of which was in part vitiated by other provisions of the agreement.[28] The railway agreements of 1896 and 1898 were reaffirmed—a provision which permitted the Russians in future to resort to them to decide all points in controversy. A system of local representation, open in principle to all nationalities, was instituted, municipal assemblies or councils to be formed in the various railway towns. They, in turn, were to elect delegates to an executive committee, the supreme local governmental body. But, while these two local bodies were to supervise local affairs generally, any important question " having reference to the public interest or the finances of the municipalities " was to be subject to revision by the head of the Chinese Board of Foreign Affairs (*Chiao Shê Chu*) in Harbin, who, in turn, was made subordinate to the Russian general manager of the railway. There was a provision for over-riding what might be an outright veto by the Russian general manager, but, inasmuch as the Russian nationals obviously could dominate the elections on account of their members, this was a questionable protection for nationals of other foreign countries. Moreover, the railway properties, such as the right of way, work-

[28] MacMurray, Vol. II, p. 1185.

shops, and stations, were to remain completely independent of any Chinese control, except for a certain police right to apprehend criminals.

This agreement of May 10, 1909, was generally acceptable to the Chinese Government, since it appeared, on the surface, a compromise in which the Russians had conceded in principle China's sovereign rights over the railway areas and had relinquished their previous claim to sole authority to establish whatever form of municipal government the railway authorities should propose. But the Chinese, by approving this agreement, sacrificed their own previous claim to police authority in the railway areas. Henceforth, until the Russian Revolution in 1917, the " railway guards " were composed of Russians and Chinese under the supervision of the Russian general manager of the railway.[24]

The Japanese and British consuls at Harbin accepted the 1909 compromise agreement, after some questioning, but not so the German and American. The German consul, for example, took the position that the entire conduct of the Russian railway administration was both a violation of the 1896 railway agreement and an unjustifiable interference with the extraterritorial rights of foreigners. There

[24] There appear to have been no special agreements on the subject of railway guards after 1909. There is, however, a reference to them in one agreement, that of Aug. 8, 1910, pertaining to trade regulations on the Sungari river. Article 5 of this agreement provided that equipment for the "railway guards" should be free of duty. The reference here was but incidental, but, in strict law, it constituted a recognition of their legitimacy. (MacMurray, Vol. I, p. 808.)

was, to heighten the German opposition, the case of the railway authorities affixing seals to the German brewery for refusal to pay the Russian-imposed municipal taxes.[25] But the real review of this vital question of Russian claims to jurisdictional rights was precipitated by the American Government which supported their consul, Mr. Fisher, in his original refusal to approach the Russian general manager for permission to establish his consular office at Harbin. To Mr. Fisher's consistent declarations that he was accredited to the Chinese Government and that Harbin was Chinese territory General Horvath invariably retorted that the "railway zone" was entirely subject to Russian jurisdiction, not Chinese.[26]

The issue which was thus raised was two-fold: there was the question of the extent of Russian jurisdiction and the separate question of the legitimate rights of foreign nationals under their extraterritorial treaties with China. The latter was major, in the view of the American State Department, for the Russian contentions, while perhaps acceptable as a practical program, were such as to prevent their acceptance technically. The Russian Ambassador at Washington, in support of the broad claims of Major General Horvath in the early stages of the contro-

[25] Harrison, E. J. *Peace or War East of Baikal?* pp. 205-207. *Vide: Revue Générale de Droit International Public,* 1909, Vol. XVI, pp. 668-672; *Journal des Debats,* Oct. 2, 4, 8, 1909; *Echo de Paris,* Oct. 5, 7, 9, 1909. .

[26] Lawton, Vol. II, p. 1301.

versy, after referring to the fact that the Japanese consul at Harbin was " favorably disposed " to the Russian position, stated in a memorandum of February 4, 1908, to the Department of State that Consul Fisher apparently was acting in a manner not authorized by his government, and requested that the Department instruct him not " to meddle in this matter " further.[27] The Department then went into the matter thoroughly before replying, but obviously had given Mr. Fisher clear instructions upon which he had acted when he assumed the post at Harbin in 1907.

On April 9, 1908, the American Government presented a lengthy statement to the Russian Ambassador at Washington, reviewing the Harbin case and expressing complete confidence in Mr. Fisher's conduct.[28] As to the question of the proper jurisdictional rights of the railway, the communication stated:

" The grant by the instrument of September 8, 1896, to the railroad company of a right of railroad administration over its own lands could not, even if standing alone, be deemed to carry a right of political administration which would amount to a transfer of sovereign rights; but the same instrument, by the French as well as the Chinese text, contains also an express provision reserving the political jurisdiction over these lands to the Government of China. This view appears to agree entirely with that expressed by the Government of Russia in the declaration of the treaty of Portsmouth—that Russia has no territorial advantages or preferential or ex-

[27] *U. S. For. Rels.*, 1910, p. 202.
[28] *Ibidem*, pp. 204-205.

clusive concessions in Manchuria of such a nature as to impair the sovereignty of China or which are incompatible with the principle of equal opportunity."

This was an unqualified interpretation of the 1896 agreement entirely in accord with the official views of China, as expressed by Prince Ch'ing to Mr. Pokotiloff in Peking. The State Department's memorandum went farther, however, to support Consul Fisher's action in refusing to recognize the right of the railway company to levy taxes upon Americans residing in Harbin, asserting that the Russian claims were in contravention of the extraterritorial rights of Americans. Americans could not be expected to acquire a license from the Russian authorities to trade in Harbin, nor were they subject to trial for any cause whatsoever in Russian courts. The American note suggested that a system of municipal administration should be established in Harbin which would conform to the multi-national systems prevalent in other treaty ports in China. It concluded that "political authority cannot be derived from the grant to the railroad company".[29]

On June 9, 1908, the Russian Ambassador at Washington again sought to influence the Department of State to instruct Consul Fisher to refrain in future from protesting the right of the Russians to conduct preliminary proceedings in judicial cases involving Americans.[30] Until December, then, the

[29] *U. S. For. Rels.*, 1910, p. 205.
[30] *Ibidem*, p. 206.

State Department conducted a second inquiry into the Harbin situation. On the twenty-ninth a communication was presented to the Russian Embassy again expressing complete confidence in Mr. Fisher and his action.[31] It denied the right of the railway company to assume any political functions whatsoever, and suggested that a municipal administration be established in Harbin by the joint action of the consular corps, entirely independent of the railway.

Shortly thereafter Major General Horvath proceeded to Peking where in May, 1909, he negotiated the agreement establishing the revised municipal scheme with concessions to foreign participation in the Harbin local government. The American Government, however, objected to this plan on the ground that it had been drawn up by the Russian railway officials who, as a matter of right, could not displace the authority of foreign consuls. *Chargé* Fletcher in Peking informed Prince Ch'ing on June 23, that "the United States finds it impossible to accept this preliminary agreement as binding upon it or its citizens".[32] Ambassador Riddle at St. Petersburg was similarly instructed on August 6 to inform the Russian Government that because it still vested in the general manager of the railway at Harbin and in the board of directors at St. Petersburg "virtual control over all important acts of the municipality", it could not be recognized.[33] To this the Ministry for

[31] *Ibidem*, pp. 207-208.
[32] *Ibidem*, p. 213.
[33] *Ibidem*, p. 213.

Foreign Affairs replied on September 23 that tax collection from foreigners was a legitimate right of the railway since, under the 1896 agreement, it had been granted "the absolute administrative right of administration over its own lands".[34] This latter phraseology—"absolute *administrative* right"—was a diplomatic liberty, taken to strengthen the appearance of the Russian case: it was not the wording of the questionable clause in the 1896 railway agreement. Nor did it influence the State Department to alter its views. A *note verbale* to the Russian Embassy of November 6 gave a still clearer statement of the reasons for American opposition to the assumption of political jurisdictional rights on the part of the railway.[35]

"The claim of the Chinese Eastern Railway that China has granted to it the municipal power necessary to the government of all cities and towns built upon the railway's leased lands is not considered by the Government of the United States to be justified by the language of the original contract of 1896 between the Chinese Government and the Russo-Chinese Bank, which is the concession under which the Chinese Eastern Railway was built and exists today. The administration by the railway company of its leased lands provided for in Article VI of the contract can refer only to such business administration as may be necessary to the 'construction, exploitation, and protection' of the railway, these being the objects expressly mentioned in the article for which these lands were granted to China."

[34] *Ibidem*, p. 217.

[35] *Ibidem*, p. 219. It was in this context that the State Department sought to exclude the possibility of interpreting the French word "administration" in an exclusively political sense.

"A reading of the whole contract", concluded the Department of State, "deprives the second paragraph of Article VI of all semblance of referring to a political administration".[36] This practically closed the controversy as far as the American and Russian governments were concerned, the American consul at Harbin refusing to authorize American nationals to subordinate themselves to local regulations which derived their authority from the May 10, 1909, agreement. This agreement, however, remained in force until replaced by the more definitive one of April 17, 1914, negotiated by the Harbin British consul with the Russian railway authorities.[37] The latter eventually received the signatures of the local Japanese, French, Belgian, Dutch and Spanish consuls, but not the American.

The American Government, however, adopted a compromise attitude after 1910, for, without formally signing the agreements, such as that of 1914, American nationals living in Harbin have been permitted to contribute taxes into a general fund which has been turned over to the railway authorities. This was a reasonable arrangement, for, even without adequate representation in municipal matters, Amer-

[36] For reasons given in a previous section, in considerable detail, the writer does not agree that this added clause of the French text was entirely without political significance. Here the American Government took a position which had not even been taken by the Chinese Government, who have not yet denied the existence of this clause, and have been careful to rest their claim on other clauses.

[37] MacMurray, Vol. II, pp. 1181 ff.

icans, like all foreigners residing in the so-called "railway settlements" in Harbin and elsewhere along the Chinese Eastern, were receiving numerous benefits especially of protection of personal and property interests.[38] It is interesting to record, how-

[38] On June 1, 1910, Secretary Knox instructed Consul Greene at Harbin that, while the United States took the position that "all rights are reserved" with respect to the question of the Harbin municipality, he should henceforth permit American nationals there to pay "their just portion of such municipal taxes as may be needed to provide the city with roads, lighting, sanitation, and police". This position was taken on the assumption that "China's sovereignty over the leased railway territory" was specifically recognized by Russia in the agreement of May 10, 1909, and on the assumption that American extraterritorial rights were inviolate. "This proposal", said the Knox instructions, "is made as a matter of equity and to relieve the municipality of any embarrassment for want of funds, in so far as relates to our own objections, inasmuch as the proper maintenance of the municipality is manifestly to the best interests of all concerned". (*U. S. For. Rels.*, 1910, pp. 230-231.) This compromise action of the State Department did not, however, prejudice the United States if subsequently it should have desired to raise the question anew. Although Ambassador Rockhill at St. Petersburg favored a compromise as to policy at Harbin and had influence in securing a change in the department's attitude toward the question, it did not result in a recognition "in principle" of the Russian contention as to exclusive jurisdiction. (Cf. Lawton, *op. cit.*, Vol. II, p. 1311.) Aside from the issue of legal jurisdictional right involved in the Harbin municipality dispute, it must be admitted that the Russian desire to collect taxes from all foreigners without discrimination whenever they chose to live in "railway settlements" along the Chinese Eastern was reasonable. There was nothing to prevent Americans, for example, from establishing their own settlement in Harbin, and nothing to compel them to live in the railway areas. The London *Times* (April 14, 1908) stated that this was made plain to Secretary Root, and that the opposition of Consul Fisher was "based rather upon the form in which the Russian officials proposed to attain their objects than upon the objects themselves".

ever, that, during 1926-28 when the Chinese authorities undertook unilaterally to alter and violate the municipality agreement of 1914, the American consul as well as the British, Japanese and Russian consuls, protested that the rights of foreign nationals were being infringed.[39]

As to the opinions of contemporary critics, notably Mr. E. J. Harrison and Mr. Lancelot Lawton who wrote from first-hand information in Manchuria during 1907 to 1910, it may be said, generally, that they were influenced more in their judgments by the practical problems of diplomacy involved than by the fundamental jurisdictional issues which both were inclined to overlook. Mr. Harrison held that Russia did not " claim any right of *legal jurisdiction* over the persons of foreign subjects resident in the Russian settlement of Harbin ".[40] In this he was clearly in error. Mr. Lawton's view that Russia's attitude raised a *vital principle* involving Japanese rights in the South Manchuria Railway areas is more acceptable.[41]

[39] To deal farther with the subject of jurisdictional and administrative rights, claimed by the Chinese Eastern Railway Company, from 1914 until the present would be quite beyond the scope of the present study. Material on that subject, however, may be found in the writer's reference volume: *The International Relations of Manchuria*, especially as noted on page xxx of the Introductory Chapter.

[40] Harrison, *op. cit.*, p. 204.

[41] Lawton, *op. cit.*, Vol. II, p. 1313.

CHAPTER III

The Acquired Japanese Jurisdictional Rights

1. The Nature of the Russian Rights Acquired by Japan. The basic cause for the numerous controversies which have arisen over the exercise of jurisdictional rights by the Japanese in the South Manchuria Railway areas is the lack of precision and agreement as to the original Russian rights. All of the latter, in so far as they pertained to the railway transferred to Japan at Portsmouth and Peking in 1905, were legally acquired by Japan after the Russo-Japanese war. We have seen in the previous chapter how the Chinese Government with partial success contested the Russian claims after 1907. Looking at the matter strictly from a legal point of view, however, it may be repeated that, except for their incidental aid to an interpretation of the acquired Japanese rights of administration in the South Manchuria Railway areas, the Sino-Russian agreements subsequent to the treaty of Portsmouth of 1905 have no direct application to the Japanese rights in the South Manchuria Railway areas.

The Harbin municipality dispute of 1907 to 1914, however, served to show that, inasmuch as Japan was compelled to rely on Russian claims to jurisdiction in the Chinese Eastern Railway areas, Japan was forced to follow a policy of strict reliance on the

contention that " absolute and exclusive right of administration " meant political administration. The Japanese Government, therefore, consistently supported the Russian railway administration during the Harbin controversy. The Japanese consul, as the Russian Embassy emphasized to the American State Department on February 4, 1908, was " favorably disposed " to the Russian contentions.[1]

The Harbin municipality question was " of paramount importance inasmuch as its solution ", as Mr. Harrison remarked in 1910, directly concerned " Japan's position in South Manchuria ".[2] Mr. Lawton, who likewise saw clearly these implications for Japan in the south, remarked that: " Claiming that in the south they had inherited Russian rights and privileges, the Japanese thereupon quoted the same articles in support of their contention that they were entitled to exercise full control over railway lands and settlements." [3] These two close observers of Manchurian politics during the post-war period, both of them press correspondents to whom we are indebted for the most exhaustive treatises on Manchurian diplomacy before 1912, disagreed as to the attitude of the powers toward the Harbin municipality issue, but agreed entirely on this, to quote Mr.

[1] *U. S. For. Rels.*, 1910, p. 202. "The Japanese . . . . who were fairly numerous, readily agreed to the Russian proposal for as was done in Harbin, so might they do in their inheritance to the South." (*North China Herald*, Feb. 27, 1909.)

[2] Harrison, *op. cit.*, p. 196.

[3] Lawton, *op. cit.*, Vol. II, p. 1310.

Lawton: "It cannot too clearly be emphasized that any protests against the exercise of Russian jurisdiction at Harbin and other places along the northern section of the railway, apply with equal force to the conditions that obtain in the south."[4]

In fact, the very issue was raised by Mr. Pokotiloff, the Russian Minister in Peking, who inquired of the American Legation why Russia was singled out for criticism at Harbin when the American Government refrained from making similar protests to the Japanese Government with regard to the South Manchuria Railway settlements under the political jurisdiction of the Japanese railway authorities and the Kwantung Government.[5] The Department of State, in reply, contented itself with the assertion that "the department has received no complaints from American residents along the South Manchuria Railway of any infringement of their extraterritorial rights nor of any exercise by the company of political powers".[6] This was, to be sure, a correct statement of the situation in the South Manchuria Railway towns: there were but few Americans residing

[4] *Ibidem*, p. 1167.

[5] Mr. Harrison, in his highly opinionative vein, remarked on this point: "Whether they [the Russians] ought to have enjoyed them or not is quite beside the present issue. The cold fact remains that they were afraid to demand them when Russia was supposed to be all-powerful, and for the same reason, when Japanese rights in South Manchuria are on the tapis, it is necessary to move with a good deal more circumspection and ceremony than when it is a question of embarrassing Russia in the north." (Harrison, *op. cit.*, pp. 210-211.)

[6] *U. S. For. Rels.*, 1910, pp. 227-228.

within them, and the Japanese have generally taken care, even to the present, not to claim jurisdiction for purposes of trial of foreign nationals in Japanese courts. But the basic issue in the two situations was identical in most respects, the differences being the result of the fact that Japan, after Portsmouth, obtained certain additional specific jurisdictional rights from China in the South Manchuria Railway areas. The right to police the railway with " railway guards " was conceded, as will be discussed in detail later, in the Sino-Japanese treaty of Peking of December 22, 1905, while the same clear right was not granted to Russia in the areas of the Chinese Eastern Railway.

When the explanation of the State Department to the Russian Embassy in Washington went farther, however, to assert that the Chinese Eastern Railway was a purely *commercial* enterprise, while the South Manchuria Railway was " practically a government railway ", and by so doing attempted to draw the conclusion that the character of the latter justified the exercise of political administrative powers just to the degree that they were consistent with American extraterritorial rights, the department was advancing a contention of very specious validity.[7] The fact was that neither was exclusively either an economic or a political enterprise. In legal nature they were identical at that time. Whatever form of organization the Japanese Government chose to give

[7] *Ibidem.*

to the South Manchuria Railway Company, the fact remains that that government could confer no jurisdictional rights which were not clearly derivable from such political rights as were originally conferred on Russia in the Chinese Eastern Railway.

One important observation may be made pertaining to this situation, however, which reveals how confused has been the juristic character of Japan's position in the South Manchuria Railway areas. Neither at that time, nor since, have the American Government committed themselves on the issue as to the scope of authority of Japan in the South Manchuria Railway districts. American nationals residing in those areas have been encouraged, as a matter of policy, to conform to the Japanese municipal regulations without raising the basic issue as to the extent of the Japanese political authority. Individual cases of American nationals protesting high taxes, for example, have arisen, as at Mukden, but the basic issue of juristic right has been passed over. The Japanese Government have been very careful not to bring such cases to final issue through diplomatic representation, and the American Government have reciprocated. Such cases have been adjusted "out of court", and the American Government are today in a position, unprejudiced by former commitments, should the occasion arise, to raise the question of the Japanese jurisdictional rights in the South Manchuria Railway areas. But American nationals living in these areas along the South Manchuria Rail-

way are very few. In Mukden, for example, by far the largest number of Americans reside not in the so-called " railway settlement ", but in the International Commercial Area. There is no reason to suppose that the Government of the United States will precipitate any far-reaching discussion of the issue.

Why an analysis, rather than a sketchy summary, of the Russian claims to political administrative rights in the Chinese Eastern Railway areas before 1905 was attempted in the previous chapter is now obvious. A summary of those claims, in so far as they may have been legally valid, is now appropriate. In view of the confusion, the ambiguity and the careless terminology of the 1896 railway contract agreement, and particularly because of the discrepancy between the Chinese and French texts, it is exceedingly difficult to draw entirely conclusive judgments from them. In view, however, of the early history of the Chinese Eastern Railway, and the conclusions suggested in the previous chapter, the following summary seems reasonable:

1. The Sino-Russian railway agreements of 1896 and 1898 did not contain a specific definition of the so-called " railway zone ". In fact, the term does not appear in any of those agreements. The Chinese Eastern Railway was authorized only to acquire such lands as were required for its construction, operation and protection. There were no provisions in these agreements justifying the acquisition of large areas, not actually necessary for the maintenance of the railway as an artery of communication, and, therefore, no provisions justifying the creation of municipal areas. Inasmuch, however,

as there were no limits set to the amount of land which might be acquired for the use of the railway, the actual acquisition of additional large areas, subsequently used solely for establishing Russian-controlled municipalities, was in strict law not prohibited. Once such areas had actually been obtained by transfer from the Chinese Government or by purchase from the local owners, a clear issue arose as to whether the original provision, especially of the clause in Article 6 of the French text, applied to them, as well as to the right of way, stations, etc. It was not until 1907 and 1908 that the Chinese Eastern Railway was prohibited, by virtue of two agreements with the Kirin and Heilungkiang provincial authorities, from further extending its lands.

2. Because the Chinese Government never questioned the enforceability of the clause contained only in Article 6 of the French text (*La Société aura le droit absolu et exclusif de l'administration de ses terrains*), it may be concluded that the clause itself had binding validity. The fact of its concealment until after 1905 did not affect its enforceability. This clause, then, was neither to be taken as meaningless, nor as conferring unqualified administrative authority of a political character upon the Russian management of the Chinese Eastern Railway. It was a grant of *limited administrative authority,* applicable, without doubt, to such lands as were reasonably acquired for the use of the railway itself. Nothing in the original agreements justified the application of the clause to municipal administration itself in areas not necessary for the operation of the railway as an artery of communication. The local Chinese authorities, as at Harbin, would have been within their rights in refusing to transfer land to the railway company for purposes other than such as were evidently commercial. Failure to insist on the limitation of the railway's lands to areas required for right of way, workshops, stations, etc., unavoidably created the major issue, namely, whether the article in the French text of the 1896 agreement was ap-

plicable to other areas, such as those included within the municipalities, without limitation.

3. The assumption of judicial authority by the Russian management of the Chinese Eastern Railway, or by other agents of the Russian Government was clearly not justified by the original railway agreements. It was, in fact, specifically prohibited by Article 5 of the railway agreement of 1896. Russia had no right, therefore, to establish courts of her own, outside of consular courts for trial of her own nationals, in the Chinese Eastern Railway areas.

4. As for police administration, it would seem that the railway was within its rights in providing for a police force to protect the railway properties themselves. On this point Article 6, in both the Chinese and French texts, is clear. China, however, was granted the general right to protect the railway from external attack (presumably against banditry). Unless these provisions be interpreted as mutually contradictory, which is tenable, they should have been interpreted to mean that a form of *joint police administration,* including both Chinese and Russian police officers, with coöperative responsibility, was to be established. There was no specific provision in either the 1896 or 1898 agreement for the institution of a Russian-controlled "railway guard". A reasonable interpretation of these agreements would seem to compel the conclusion that such a police force as the railway might establish to police its own properties should have been a purely civilian force, not military, since quartering of regular Russian troops anywhere along the railway was prohibited. Somewhat of a change occurred, however, when, after the Boxer Rising, the Chinese Government were constrained to sign the agreement of 1902 by which Chinese troops and police were prohibited from assuming any jurisdiction in the railway areas. Without a specific grant of power from China, therefore, the Russians after 1902 had at least the right to prevent Chinese assumption of jurisdiction in police matters. Thus,

out of this complex situation, the *status quo* on the Chinese Eastern Railway, when the southern portion was transferred to Japan in 1905, was one in which the Russians had *de facto* police authority, while the Chinese had none at all.

5. Such administrative rights as were legally possessed by the Chinese Eastern Railway Company were, in fact, possessed by the Russian Government. The railway company, as well as the Russo-Chinese Bank which financed its construction, was actually subject to control by the Russian Government through the Ministry of Finance. All the essential "control" provisions of the railway contract and its statutes were carefully devised so as to safeguard the power of the Russian Government and reduce Chinese participation to a minimum. The actual financial investment in the railway was very predominantly Russian, and principally official. The railway was, in fact, a vested proprietary interest of the Russian Government, which had guaranteed the profits and purchased the major part of both the share and bond capital. The railway itself, therefore, was capable of being transferred to an outside party by the Russian Government, provided the consent of the Chinese Government were obtained.

Japan obtained, therefore, by the treaty of Portsmouth and the treaty of Peking (with China) by no means absolute and exclusive rights of political administration. These rights were broad, but they were qualified. Except in so far as the *de facto* exercise of jurisdiction by the Russians over the Chinese Eastern Railway areas before 1905 may have been acquiesced in officially by the Chinese Government, their unilateral appropriation to themselves of specific administrative functions can hardly be taken as legal precedent for claims to jurisdiction on the part of their successors, the Japanese. The Japanese

Government, when eventually it was apprised of the existence of the clause in Article 6 of the French text of the 1896 contract agreement, legitimately resorted to it, but, in so doing, the other clauses of the railway agreement were not to be nullified. As will appear later, the Japanese Government, while placing emphasis on the claim of right, as expressed in this article (*La Société aura le droit absolu et exclusif de l'administration de ses terrains*), have been careful not to apply it in such a manner as to violate the extraterritoriality privileges of third parties. As for providing municipal administration in large "railway settlements", and establishing a "railway guard" along the entire railway, the Japanese have followed the Russian precedents.

It will be well to keep in mind, then, in the ensuing sections, several questions, answers to which will appear subsequently: (1) Were the Russian rights transferred in their entirety to Japan in 1905 in so far as they were applicable to the South Manchuria Railway areas? (2) Were additional rights conferred upon Japan in or associated with these instruments of transfer? (3) Have additional rights of political administration or of judicial authority been conferred by China upon Japanese authorities having control of the South Manchuria Railway areas? (4) Has Chinese official acquiescence in the practical exercise of administrative functions by Japan in the South Manchuria Railway areas served to transform hitherto *de facto* situations into *de jure* rights?

It may be anticipated that staccato summaries of the evidence on the new problems here raised are as impossible without thorough attention to interpretative facts as was a ready reply to the question as to just what were the original Russian rights. The first of the above questions will be discussed presently.

2. The Effect of the Treaties Which Transferred the Russian Rights to Japan. The Japanese Government have never contended officially that the original Russian rights in those portions of the Chinese Eastern Railway which were acquired by Japan in 1905 were received by right of conquest. Had Japan asserted this claim at the outset—a claim which, however, would have been exceedingly difficult to establish, if at all possible—the Japanese Government, in their subsequent policy with respect to the South Manchuria Railway, would not have been hampered by the self-imposed limitations of the treaty of Portsmouth and the treaty of Peking which followed immediately thereafter with China. In the nature of the case, Russia could not have transferred rights to Japan which the former did not legally possess. Russia possessed in Manchuria no territory over which she had sovereignty. All the Russian rights in the Chinese Eastern Railway were derivable from specific grants of China or were non-existent. These were, moreover, of a temporary character, expiring with the recovery of the road by China. Although there was no specific provision in the original rail-

way contract agreement of 1896, or in the contract of 1898 which applied to the southern section eventually acquired by Japan to the effect that the Russian rights were non-transferable to a third party without China's consent, that condition was a reasonable inference from the clause which provided that only Chinese and Russians could possess shares in the Chinese Eastern. The Russian delegation at the Portsmouth conference, therefore, insisted that the Japanese Government should obtain the consent of China to the transfers there made.

The treaty of Portsmouth, signed on September 5, 1905, by Count Serge Witte and Baron Jutaro Komura, as the principal delegates for their respective governments, provided, *inter alia,* for the transfer of the railway between Kuanchengtzu (near Changchun) and Port Arthur to the Japanese Government. The parties mutually agreed that the consent of China to this transfer, as to the transfer of the Kwantung leased territory should be obtained.[8] As for the remaining articles of the treaty, it should be emphasized that they derive validity as between China and Japan only to the degree to which they were subsequently accepted by China. Russia and Japan, for example, might and did agree to maintain railway guards and to limit the number which might be stationed along their respective lines, but China was not bound by it. Had the Chinese Government merely sanctioned the transfer of the Russian rights

[8] MacMurray, Vol. I, p. 523. Article 6.

without specific mention of the subject of railway guards and police jurisdiction generally, Japan would subsequently have had to fall back exclusively on the original Russian rights. This was, however, not the case after the signature by China on December 22, 1905, of the two agreements signed at Peking on that date.[9]

Following the conclusion of the treaty of Portsmouth, Baron Komura proceeded to Peking by way of Toyko to secure China's consent to these transfers.[10] The negotiations conducted in Peking during December do not concern us here except in so far as they resulted in international legal instruments affecting Japan's juristic position in the South Manchuria Railway areas. Baron Komura and Prince Ch'ing as chief delegates signed the two agreements, the brief treaty of December 22, 1905, and the Additional Agreements of the same date, which contained China's consent to the transfer of the Russian rights in the Kwantung leased territory and in the

[9] The Russian and Japanese Governments in Article 7 engaged "to exploit their respective railways in Manchuria exclusively for commercial and industrial purposes and in no wise for strategic purposes". This constituted an agreement only as between the signatories. Should they have agreed subsequently to do otherwise the particular article would no longer have had any binding validity, and in any case its wording was too indefinite to constitute an adequate check upon the dispatch of railway guards, for example, to particular points to protect what were claimed as commercial interests in the railway.

[10] No attention is here given to the rejection of the proposal of Mr. E. H. Harriman to purchase the lines transferred to Japan as no factors pertaining to the legal character of Japan's rights were there involved. *Vide: Japan's Special Position in Manchuria,* index.

railway territories acquired by Japan at Portsmouth. The formal treaty was limited to a statement of China's consent to the transfers as made by Russia in two articles, five and six, of the Portsmouth treaty.[11] The language of the treaty is as follows:

"*Article I.* The Imperial Chinese Government consent to all the transfers and assignments made by Russia to Japan by Articles V and VI of the Treaty of Peace above mentioned."

"*Article II.* The Imperial Japanese Government engage that in regard to the leased territory as well as in the matter of railway construction and exploitation, they will, so far as circumstances permit, conform to the original agreements concluded between China and Russia. In case any question arises in the future on these subjects, the Japanese Government will decide it in consultation with the Chinese Government."

This, the official English translation of the Japanese text of the treaty, reveals how the Japanese Government bound itself to abide by the terms of the original Sino-Russian agreements pertinent to the newly acquired Japanese railway and its territories.

Ambiguities, however, appear in Article 2 in two phrases—"so far as circumstances permit" and "the Japanese Government will decide .... in consultation with the Chinese Government" any question of interpretation. Attention may be drawn to the fact that these agreements were drawn only in Chinese and Japanese with no other foreign language as the neutral one for purposes of interpretation of mooted clauses. While this was a new de-

[11] MacMurray, Vol. I, pp. 549-550. Japanese official translation.

parture, Japan usually having drawn treaties with a neutral French text, it was one which was to be fraught with future complications. The official English version, as presented by the Japanese Government, does not appear to be a correct rendering of the Chinese text. The idea of mutual agreement derived from equal authority for the two parties to present their views as to interpretation is clearly the intent of the Chinese text, as the following translation indicates:[12]

"Article II. The Government of Japan engages to earnestly observe the original agreements entered into between China and Russia respecting the lease and the construction of the railway, and to promptly consult and determine with the Government of China as matters come up in the future."

According to the Chinese text, questions of subsequent interpretation were to be decided by the two governments *by negotiation between them,* each party having equal voice with the other.

What concerns us here, however, is this documentary reply to the first fundamental question previously raised as to the acquisition of the Russian rights by Japan in 1905. The Chinese Government explicitly agreed to the transfer of the southern section of the Chinese Eastern Railway to Japan, but the Japanese Government undertook to be bound in regard to that railway to the terms of

[12] Translation of the official Chinese text as printed in: *Yüeh Chang Hui Yao* [Collection of Treaties, Regulations, etc.], published at Mukden, 1927. Vol. I, p. 121. Translation by Hsü, Shu-hsi in *Problems of the Pacific,* 1929, p. 473.

the Sino-Russian agreements pertaining thereto and negotiated before 1905. Japan was, therefore, the new grantee of the original railway construction and operation rights which provided that China could recover the line by repurchase in 1939 (36 years after the completion of the line, i. e., after 1903), and, failing that, to receive the line back, without paying Japan compensation of any sort, in 1983 (80 years after 1903).[13] In passing, it should be noted that after 1915 the Chinese Government no longer retained the right to recover the South Manchuria Railway in 1983, the Sino-Japanese treaty and notes of May 25, 1915, having extended the period of Japanese control to a total of ninety-nine years.[14]

This brings us to the second fundamental question as to the bearing of these Sino-Japanese agreements of 1905 on Japanese jurisdictional rights in the railway areas which, after 1906, were operated by the South Manchuria Railway Company. Were additional administrative rights conferred on Japan by those instruments? None, in the brief treaty itself, which was merely the instrument of transfer of the

[13] See Article 12 of the original contract agreement of September 8, 1896. (MacMurray, Vol. I, p. 77.) The special railway contract agreement of July 6, 1898, for the southern section confirmed, in the preamble, the terms of the 1896 contract. (MacMurray, Vol. I, p. 154.)

[14] MacMurray, Vol. II, pp. 1220-1225. The international legal validity of the Sino-Japanese treaties and notes of May 25, 1915, is discussed in considerable detail in another volume of this series, titled, *The International Legal Status of the Kwantung Leased Territory*, published uniformly and contemporaneously with this volume. Chaps. VIII and IX.

Russian rights. In the Additional Agreement of the same date, however, which was an integral part of the treaty for purposes of legal interpretation, the Chinese Government did give official sanction to the maintenance of " railway guards " along the South Manchuria Railway. The intent of the Chinese Government, however, in conferring this right, by agreeing to a limitation of the number of railway guards to fifteen per kilometer, was obviously to grant only a temporary right to the Japanese.[15] This subject of Japanese " railway guards " is reserved for detailed attention later, and it is sufficient here to point out that China, by agreeing to the continuance of Japanese " railway guards " along the South Manchuria Railway, actually conferred on Japan a right which before 1905 was unilaterally assumed by the Russians in the Chinese Eastern Railway areas.[16]

There is, finally, one article of the Sino-Russian railway construction contract of July, 1898, which has important application to Japanese jurisdictional rights in the lands which were taken over by the newly-organized South Manchuria Railway Company in 1906. Under Article 4 of that agreement the Chinese Eastern Railway—hence Japan after 1905—was to be allowed " in the regions traversed by this branch line to mine such coal as may be needed for

[15] MacMurray, Vol. I, p. 551.

[16] This Additional Agreement of December 22, 1905, also authorized the Japanese Government to convert the Antung-Mukden railway into a commercial line, China to have the right of repurchasing it eighteen years from 1905.

the construction or operation of the railway ".[17] By virtue of this article the Japanese Government took over such mines as were operated by the Russians, especially at Fushun near Mukden, and by so doing precipitated a controversy over the limits of the mining areas rightfully appropriated which continued for five years. There apparently are no special agreements, either between China and Russia or between China and Japan, which have particular bearing on special administrative authority over such mining areas. The Japanese Government have assumed jurisdiction over them much the same as over all the lands attached to the South Manchuria Railway, the mines themselves generally being operated by the company.[18]

It is difficult to avoid certain conclusions of incidental bearing on the legal interpretation of these significant international settlements of 1905, conclusions which serve to explain why the treaty of Portsmouth and the agreements of Peking were so indecisively drawn. These agreements reveal that the Japanese Government preferred such indecisiveness in terminology, simply because Japan stood in a favorable position to place on them an interpretation influenced by her newly acquired prestige in the unruly

[17] MacMurray, Vol. I, p. 155.

[18] Cf. Weale, B. L. P., *The Truce in the East and Its Aftermath,* pp. 259-262. This reference will serve to give an account of the internal weakness of China, particularly of the precarious political position of Yuan Shih-k'ai, the Chinese negotiator of the Sino-Japanese agreements of December, 1905.

" family of nations ". That the Peking agreements were drawn in only Chinese and Japanese, a notable departure for Japanese diplomacy, bears out this conclusion. As for the Chinese attitude in the Peking negotiations, it was obviously one of endeavoring to reduce the concessions granted to Japan to a minimum. This minimum was not small, however, and China's non-insistence on decisiveness in the resulting agreements may be attributed to her hope that there might come a better day when questions left open in such agreements might be resolved more in her own favor. These agreements and the very treaty of Portsmouth itself are so replete with ambiguities and generalizations, so non-technically phrased, so careless of fundamentals, that the task of handling them as legal instruments is at times baffling. The treaty of Portsmouth deserves the description applied to it by Professor F. de Martens when he declared it to be one of the most loosely drawn international instruments in existence. That these agreements were to give rise to continual diplomatic conflict, even to the present day, was inherent in their character. There is much in Manchuria, however, which is of most vital importance, including *de facto* jurisdictional situations, which has developed and persists without much attention to international legal instruments as rules of conduct.

2. The Nature of the South Manchuria Railway Company. There has always been a certain amount of perfectly understandable confusion abroad as to

the legal nature of the South Manchuria Railway Company. Putting the matter in more popular language, the question has frequently been raised as to whether this, the most influential of all foreign-controlled enterprises in Manchuria, is properly called an " official ", a " semi-official " or a " private " company. The matter is important, for example, when the South Manchuria Railway Company undertakes to float a loan abroad, as in the United States or Great Britain. Questions of state policy in the relations of these states to Manchurian problems generally are involved, as was evidenced by the disinclination of the Department of State of the United States, during 1927-28, to give its approval to a proposed loan to the company to be floated in the New York market by J. Pierpont Morgan and Company. That particular matter was allowed merely to become moribund, without definitive issue.

A caution, necessarily to be emphasized at the outset in a description of the legal status of the South Manchuria Railway Company, is this: the South Manchuria Railway Company is a creature of the Japanese Government, having been organized under Japanese law and having derived such powers as it possesses, whether commercial or political, from the Japanese Government. The fact, therefore, that the company actually does exercise in practice certain specific administrative functions is no evidence that the legal right to do so, from an international point of view, has been conceded by the Chinese Govern-

ment, China, in the last analysis, having sovereignty over all of the railway's lands. A distinction should be drawn between the rôle of this company as an instrumentality of Japanese policy and its international legal rights. A description of the powers conferred on the South Manchuria Railway Company by the Japanese Government, however serviceable to explain the character of the company itself, should not serve as a suggestive substitute for a legal analysis of juristic rights in the areas under the *de facto* administration of the company.[19]

[19] Professor M. Royama's approach to an analysis of "The South Manchuria Railway Zone", in his article in *Pacific Affairs*, November, 1930, is one which confuses the functions of the railway company as an *administrative agent* of Japan with the question of international legal rights in the territories under its *de facto* administration. A suggestive quotation from that article is this: "Whatever may have been the Japanese Government's intention on the occasion of the conclusion of the treaty, the actual administration since then unmistakably reveals Japan's attitude, which considers the Railway Zone as nothing but an extension of the lease of Kwantung province. In other words, the present status of the zone is the product of the past twenty-five years, during which the Japanese Government has put forth a tremendous effort in the actual management and administration of the zone. Against this historical fact, China, who is vehemently opposed to it as a matter of policy, will try in vain to obtain a solution simply by means of an opposite interpretation of international law and treaties." (p. 1032.) It is, in the writer's opinion, patently fallacious to assert, as does Dr. Royama, that "in order to determine the nature of the right of administration of the Railway Zone, we seem to have first to recognize that the right in question has been and is treated, in its relation to the law of Japan, as something of a right of government, and then proceed to adjust the right of such nature to the international contact and relations with the Chinese and other foreigners". (pp. 1032-33.) The approach of an international lawyer should reverse this suggested process of

On at least one occasion the Department of State of the United States seems to have permitted itself to fall into the very confusion here under criticism. Mr. Pokotiloff, Russian Minister in Peking, had in 1909 called the attention of the American Minister to the fact that it appeared that the Chinese Eastern Railway was unjustly singled out for criticism, when, as a matter of fact, such administrative rights as the South Manchuria Railway Company was exercising in its railway areas were identical with those claimed by the Russians in Harbin and elsewhere. He correctly drew attention to the fact that the international legal rights, which might be legitimately exercised in either area, were derivable from one and the same source—the original Sino-Russian railway contract agreements of 1896 and 1898 for the construction of the Chinese Eastern.[20] Secretary Root, however, in an indirect reply, contented himself with the assertion that, while the Chinese Eastern Railway was a purely *commercial* enterprise, the South Manchuria Railway was "practically a government railway".[21] The fact is that at that time the two railway systems possessed identical international legal rights, except, perhaps, in the matter of the "railway guards". In the same communication the State

judicial analysis. The Japanese Government can legally confer no rights on an instrumentality, created by itself, which rights are not clearly possessed by Japan in the first instance.

[20] *U. S. For. Rels.*, 1910, pp. 227-228.

[21] *Ibidem.*

Department made the assertion that, of the two, only the Chinese Eastern Railway was itself subject to extraterritoriality as a private enterprise. This was in error, for the South Manchuria Railway Company does possess the character of a private "joint stock company" in that it has exactly the same legal status in commercial dealings in China as any other foreign corporation, such, for example, as the Standard Oil Company of New York.

In order that the South Manchuria Railway Company may be regarded as less of a chameleon than its true characteristics warrant, a description of its nature under Japanese law, and of its actual rôle in relation to Japan's legal position in Manchuria, would seem to be unavoidable. It is true that the South Manchuria Railway Company is a *private* joint stock company, organized under Japanese law, having the status, for purposes of exemption from jurisdiction in Chinese courts, of any ordinary foreign commercial concern, and having, as one of its principal objects, distinctly private commercial functions to perform. These latter are not limited to railway management. They include supervision of the Fushun collieries and the Anshan iron and steel works. They include participation in the control of an express company and a steamship line. They range into the fields of banking and loan enterprises, and merge into so-called public functions, in the domain of public utility administration in the railway municipalities. The debentures of the company

are sold in the markets of Tokyo and London, and it enters into private contracts with individuals, corporations and governments, much as any other private corporation. It is, to repeat, a joint stock company, some of whose shares of capital stock are owned by private Japanese subjects, who are entitled to dividends. Here, however, the status of the South Manchuria Railway Company as a private commercial enterprise ceases.

The South Manchuria Railway Company, moreover, is, at the same time, a " public " institution in the sense that its functions include most of those enterprises which appertain to a municipal corporation. It is, in fact, responsible for practically all municipal enterprise in the so-called South Manchuria Railway zone, with the one exception of control of the municipal police and the railway guards, who are responsible to the Kwantung Government and the commandant of the Kwantung Garrison respectively. By a Japanese Government order of August 1, 1906, the company was authorized to engage not only in railway transportation enterprises of a commercial nature, and to undertake the operation of mines, water transportation systems, electrical enterprises, warehousing, business related to the land and buildings of its " attached lands ", and the " sale on commission of the principal goods carried by the railways ", but was given complete charge of the development and administration of public utilities within its areas, as well as responsi-

bility for " engineering works, education, sanitation " and additional services with which the Japanese Government, with the approval of the Diet, might choose to endow it.[22] That the company has assumed these responsibilities and justified its trust, to the great good of the inhabitants under its jurisdiction, particularly in the field of public utilities, sanitation and health, education and scientific experimentation in agriculture and industry, is obvious, especially when the so-called " railway towns " are compared with the native Chinese cities which adjoin them. In these services the South Manchuria Railway Company has performed a very creditable task.[23]

Turning, then, to the " political " character of the South Manchuria Railway Company, it is possible to point to numerous features which indicate that it is a semi-official institution with a controlling influence reserved to the Japanese Government itself. These characteristics are evident most conspicuously in the Imperial Ordinance (No. 142) of June 7, 1906, which sanctioned the organization of the company, in the government order of August 1, 1906, which determined the scope of its authority, and in the articles of incorporation, of the same

[22] MacMurray, Vol. I, p. 557.

[23] *Vide:* Hornbeck, S. K. *Contemporary Politics in the Far East.* p. 274. This reference gives one of the best accounts of the South Manchuria Railway Company which has ever been written by an impartial observer. It gives credit where credit is due—and criticism where it is justified.

date, which determined its financial character and defined the " control " provisions under which it was to operate. Taken as a whole, they reveal the South Manchuria Railway Company as a semi-official institution, created by, responsible to, and subject to change or abolition by, the Japanese Government.

First in importance are the financial provisions of these documents. The Imperial Ordinance of 1906 authorized the formation of the " South Manchuria Railway Joint Stock Company ", with the proviso that its shares might be " owned only by the Japanese and Chinese Governments or by subjects of Japan and China ".[24] The share portion of the Japanese Government was to be the railways, their appurtenances, and the coal mines, transferred by Russia to Japan in the treaty of Portsmouth. The Japanese government order of August 1 expanded these provisions, and provided that the initial share capital of the company should be 200,000,000 yen, one-half of which should be considered as owned by the government in consequence of its transfer of the physical properties of the railway system to the company.[25] Each share, according to the articles of incorporation, was to have the value of 200 yen, share certificates to be issued in units from one to ten thousand.[26] The Japanese Government guaranteed, for a period of fifteen years, a dividend of 6% on

[24] MacMurray, Vol. I, p. 555.
[25] *Ibidem*, p. 557.
[26] *Ibidem*, p. 559.

the shares held by private owners, and, likewise, guaranteed, under conditions, the payment of interest on the debentures issued by the company for the construction of railways or for operation of its related enterprises. At the outset the Japanese Government subscribed to four-fifths of the paid-up capital.[27]

What is significant, for our purposes, here is the fact that the Japanese Government own one-half of the shares of the capital stock of the South Manchuria Railway Company, and, in consequence, inasmuch as each share permits the holder to cast one vote in a directors' meeting, the government, at the

[27] It has been noted that in 1906, of the 500,000 shares of 200 yen each reserved to private subscribers, only 100,000 were actually offered for subscription. The balance of 80,000,000 yen was raised by debentures. By 1921, however, three new issues of shares had been offered in Japan, which, with the first issue of 1906, totalled 160,000,000 yen. In March, 1920, the "authorized capital" had been increased to 440,000,000 yen.

The company actually financed its operations between 1907 and 1911 largely with loans obtained in the London money market, to a total of £14,000,000, as follows: July 19, 1907, £4,000,000 at 97, with interest at 5% (due 1932); June 1, 1908, £2,000,000 at 98, with interest at 5% (taken up in 1911); December 16, 1908, £2,000,000 at 97½, with interest at 5% (due 1942); and January 3, 1911, £6,000,000 at 98, with interest at 4.5% (due 1936). This gives an outstanding total of foreign loans of £12,000,000. On December 1, 1920, the Japanese Government assumed the responsibility of paying the interest and capital on the loans taken in London. After 1911, the home market was principally resorted to to float its debentures, over 100,000,000 yen of debentures being issued between 1917 and 1922. In 1923 a fifth loan was obtained from London to the amount of £4,000,000. (*The South Manchuria Railway: its origin, development, etc., op. cit.*, pp. 12-13; Bank of Chosen *Economic History of Manchuria*, pp. 94-96; *Report on Progress in Manchuria:* 1907-1928, p. 71.)

outset, could control, at any time, 500,000 votes. Extra votes are, in practice, always subject to control by the government, inasmuch as the directors themselves, who are designated by the government from individuals who own fifty or more shares of the capital stock, are appointed by the Japanese Government. They may be expected to support the president and vice-president who vote the government's shares. Aside from large blocks of shares owned by the directors at any given time, and the blocks owned by ex-directors or by potential directors, there is, apparently, a wide distribution, as indicated by the fact that, when they were originally offered for subscription in Japan, the patriotic fervor of the *post bellum* period caused the Japanese to over-subscribe the first issue of shares a thousand times.[28]

No shares in the South Manchuria Railway were ever purchased by the Chinese Government, and, although it appears that a few shares have been held by Chinese in the employ of the company, the amount is negligible. The provision that only the Japanese and Chinese governments and their subjects might own shares in the South Manchuria Railway Company might have been expected to result in the ownership of practically all the shares by the Japanese

[28] Kinney, H. W. *Manchuria Today*, p. 37. (1930 ed.) The first issue of shares, offered for subscription in September, 1906, was limited to 20,000,000 yen, or 20% of the shares actually reserved for private purchase. As only twenty-yen payments were required on each share of 200 yen, it was somewhat singular that the government should have undertaken to guarantee 6% on the investment for the first fifteen years.

Government and its citizens. Apparently the Japanese Government formally inquired of the Chinese Government " if it had any intention of subscribing to the shares " of the company, and " obtained a reply in the negative ".[29] The initial over-capitalization of the railway, the ownership of half the shares by the Japanese Government, the " control " provisions which placed the railway under government direction, and the attendant circumstances of Chinese hostility to Japanese enterprise in Manchuria after the Russo-Japanese war might have been expected to discourage Chinese investment in the South Manchuria Railway Company.[30] The situation, there-

[29] Official statement of the South Manchuria Railway Company, contained in: *The South Manchuria Railway: its origin, development, etc.*, p. 10. (Published at Dairen, December, 1922.) Mr. Y. Matsuoka, formerly a member of the Board of Directors and at one time vice-president of the South Manchuria Railway, is authority for the same statement: " When the South Manchuria Railway Company was first established, the Chinese were offered an opportunity to subscribe to shares, but they declined to avail themselves thereof." (Address at the Kyoto Conference of the Institute of Pacific Relations, November, 1929. Brochure, p. 9.)

[30] The late Mr. Bertram Lennox-Simpson, writing in August, 1906, from close contact with Chinese opinion, asserted that " it is impossible to imagine that Chinese individuals will invest their money " in the South Manchuria Railway Company. (*The Truce in the East and its Aftermath*, p. 229.)

American Ambassador Wright at Tokyo, in a dispatch to the State Department, June 15, 1906, enclosed a communication from Consul Miller who gave the opinion " that the portion of the shares taken by the Chinese would be small ". " It is evident from the foregoing ", declared the Ambassador, " and from a perusal of the regulations themselves that it is the policy and purpose of Japan to own a controlling interest in and direct the operations of all the railways in Manchuria in much the same way as the government roads in Japan."

fore, is much the same today as it was in 1906, in so far as national control of the capital stock of the South Manchuria Railway is concerned. The total capitalization of the railway company was increased in 1920 to the present 440,000,000 yen, of which one-half is owned by the Japanese Government.

Turning to the " control " provisions in the original documents of 1906, which provided for the organization of the South Manchuria Railway Company, one is confronted with numerous features which insure the practical subordination of the company to the Japanese Government itself. Of primary importance is the fact that the president and vice-president of the company are appointed by the Japanese Government with Imperial sanction.[31] They need not be shareholders, but in a shareholders' meeting, the president acts as chairman with the right to vote as if he were a shareholder, having additionally a deciding vote in case of a tie. The articles of incorporation give the president broad powers (Art. 40) as indicated by the delegation of authority which reads that he " shall represent the company and have control of all its affairs ". In practice, it is evident that there has always been a tendency for

(*U. S. For. Rels.*, 1906, Pt. II, p. 1017.) He commented upon a statement of the Japanese-language paper, *Jiji Shimpo*, which regretted that "the new company has been compelled to organize upon the narrow lines of its Russian predecessor, which was so opposed to the principle of the 'open door' and equal opportunity".

[31] Imperial Ordinance (No. 142), June 7, 1906. MacMurray, Vol. I, p. 556. Also: Articles of Incorporation, August 1, 1906, in MacMurray, Vol. I, p. 561. *U. S. For. Rels.*, 1906, Pt. II, pp. 1010-1016.

the directorate of the railway to refrain from creating obstacles to major presidential policies, the disinclination of the directorate to exercise independence of judgment being due especially to the recognized rôle of party politics in determining the administration's policies. As for the directors, they, also, are appointed by the Japanese Government from among those who own fifty or more shares.[32] These appointments, in practice, are made by the Premier, their term being nominally four years.[33] In addition to these stipulations for government control of the management personnel of the South Manchuria Railway Company, there are several other "control" provisions, which insure a preponderance of government influence at any given time with respect to policy, and which enable the government to alter the very nature of the company itself. The government order of August 1, 1906, provided that the approval of the Japanese Government must be received for changes in the company regulations, for proposed budget estimates for any fiscal year, and for permission to float debentures of the company.[34] Article 22 provided that "without the permission

[32] Articles of Incorporation. MacMurray, Vol. I, p. 561.

[33] Actually, for the past quarter century, the Genro, that peculiarly Japanese institution which now survives only in the person of Prince Saionji, has played a leading rôle in determining the men to be appointed to the South Manchuria Railway management, particularly the president and vice-president. An incoming president, confronted by resignations of members of the directorate, is usually permitted to select directors *persona grata* to himself.

[34] MacMurray, Vol. I, p. 558.

of the Government the company shall not dispose of its principal rights and properties; nor give the same for security". Only with the approval of the government were railway freight charges to be altered. Company construction and development projects were similarly subordinated to the government. Finally (Article 25), this order of 1906 provided: "At the designation of the Government the company shall be under obligation at any time to place the railways, land and any other articles at the services of the Government." [35]

These, then, are the stipulations of the basic orders and the articles of incorporation which insure a preponderance of control by the Japanese Government. The practice of the last quarter century reveals even more clearly how this influence operates. The late Viscount Shimpei Goto, once mayor of Tokyo and several times a cabinet minister, was the first president of the South Manchuria Railway Company. His appointment, as he himself has explained, was made under the influence of the Minister of War, Viscount Terauchi. General Viscount G. Kodama, of Russo-Japanese war fame, who was chairman of the Organization Committee, was responsible, in the main, for persuading Baron Goto to accept the post. Goto had at first declined the appointment, feeling strongly that the South Manchuria Railway Company should be a highly centralized institution, responsible, through the president, to the Japanese

[35] *Ibidem.*

Government, and not to the Governor-General of the Kwantung leased territory.[36] "He wanted a free hand, and he got it."[37] Baron Goto served as president less than three years, establishing a precedent which, under the dominating influence of party politics in the home government, has persisted, with a

[36] The late Viscount Goto, in a lengthy article, written in 1927, titled "Japan's Special Mission in South Manchuria", gave numerous interesting facts about the origin of the company, and explained that his final acceptance of the presidency was made on condition that he would be directly responsible to the Foreign Minister, not the Governor-General of Kwantung. "On July 25, 1906, I got into Tokyo at a summons from the Central Government. Under the direction of the Home Minister, Mr. K. Hara (subsequently assassinated when Premier) I waited at once on Premier Saionji who pressed me to take up the Presidency of the S. M. R. Co. When I asked the Premier where the center of gravitation of the railway management was, the Premier replied that, although the Governor-General of Kwantung held the supervising authority, the party in the Central Government directly responsible should be the Foreign Minister." (Later) "I saw Marshal Yamagata and argued that an army officer might do better for the President of the new Company if the responsibility of the management were to be divided among different Government dignitaries. . . . . After a few exchanges of views, the point came to be made clear that the President of the new Company should be made the center of gravitation of the Company's management. . . . . War Minister Terauchi also pressed me to accept." (*Manchuria Daily News*, May 5, 1927.)

[37] Hoshino, T. *Economic History of Manchuria*, p. 66. (Bank of Chosen publication.) "In practice . . . . the South Manchuria Railway Company was no less an organ of the State than the Government-General of Kwantung itself, in that the economic interests of Japan in Manchuria acquired by an immense sacrifice of life and money were now placed under their charge. Baron Goto, to whom the first presidency of the company was offered, saw the difficulty likely to arise from this complexity of powers, and steadily declined it, and it was only after an understanding was established between him and all those concerned that he accepted the offer."

few exceptions, until the present: although the term of president was fixed at five years, in practice few ever have served the full term. It is interesting to recall, too, that, between 1914 and 1918, General Baron Y. Nakamura was concurrently president of the South Manchuria Railway Company and Governor-General of Kwantung.[38]

In recent years the management of the South Manchuria Railway Company—most conspicuously the president and vice-president, and somewhat less so, the directorate—has been subject to change with each new cabinet in Japan. For example, in the period just before July, 1927, these offices were under the influence of the Kenseikai, which formed the ministry. Mr. B. Yasuhiro was president of the railway, his partisan affiliations being somewhat modified by his personal relation to Prince Yamagata. Nevertheless, the incoming Seiyukai ministry, under the premiership of the late General Baron Tanaka, forced his resignation, Mr. Jutaro Yamamoto, secretary-general of the Seiyu Party, being appointed in his stead, with Mr. Y. Matsuoka, as vice-president. On June 27, just before offering his resignation, Mr. Yasuhiro gave out the following statement to the press: "I am going to resign since the Government wished me to. The position of the Company's president is insecure, and each president has been obliged to resign before the term of his tenure

[38] This situation has been impossible since the creation of the Kwantung Government (a civil administration) in 1919.

was up. No president will be able to accomplish anything under such a system." [39] In April he had declared that "as a new party comes into power, plums must be distributed, and since the number of the cabinet ministers is limited, those outside Japan proper will have to be given away".[40] Upon Mr. Yasuhiro's resignation, Mr. Yamamoto assumed the presidency of the railway company, and, because of his known party influence in the Diet, actually remained a member of that body during his incumbency as president of the railway.[41] That the special character of the China policy of the Tanaka Ministry was reflected in Manchuria by the administration of President Yamamoto is quite obvious. President Yamamoto repeatedly stressed the point that the South Manchuria Railway should be run more with the object of fulfilling Japan's "innate mission" than as a profit-making enterprise.[42] Under his ad-

[39] *Manchuria Daily News*, June 27, 1927. Yamamoto and Matsuoka were officially appointed on July 19, the previous incumbents being relieved of their posts. At the same time Baron K. Okra and Mr. Mori resigned from the directorate "for personal reasons", giving place to Mr. Tanabe and Mr. N. Kohiyama.

[40] *Ibidem*, April 20, 1927.

[41] "At yesterday's session of the cabinet ministers and other dignitaries, it was agreed that H. E. Yamamoto, the new President of the S. M. R. Co., need not withdraw from the Seiyukai inasmuch as he is to carry out its policies under the Seiyukai Ministry." (*Ibid.*, July, 20, 1927.)

[42] The following remarks were ascribed to Mr. Yamamoto on his assumption of the presidency: "We need not say a word about what very important bearing Manchuria and Mongolia have to the Japanese nation. For them, Japan has fought twice at heavy stakes. The nucleus of Japan's position in Manchuria and Mongolia consisted of flesh and blood, and an immense amount of effort and sacrifice has

ministration the presidency of the railway company tended completely to eclipse the rôle of the Governor of Kwantung, the constitutional authority of the two being such that their relative importance at a given time is determined by the personal prestige, abilities and party influence of the incumbents.[43]

The resignation of the Tanaka Ministry on July 2, 1929, was actually due principally to that " certain serious incident " which occurred when a bomb, affixed to the viaduct under the South Manchuria Railway tracks just outside Mukden, exploded and killed Marshal Chang Tso-lin, who was travelling from Peking in a coach of the Peking-Mukden Railway. With the incoming Hamaguchi Ministry of the Minseito, Mr. Yamamoto was replaced as president of the South Manchuria Railway by Dr. Sengoku. Dr. Sengoku proceeded at once to upset the Yamamoto program, as, for example, the plan to develop the Anshan iron deposits, which he alleged was projected on the basis of rash calculations as to the reserves available.[44]

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been laid out to cultivate and consolidate it. Thus the Railway Company has a more important mission than a merely economic one." (*Manchuria Daily News*, July 20, 1927.) *Vide:* The writer's article in *Pacific Affairs*, December, 1928, p. 15. This gives the gist of Premier Tanaka's declaration of policy toward China, as explained at the so-called Oriental Conference (of Japanese officials, including those in China) held at Tokyo in July, 1927.

[43] *Vide:* " Japan's Colonial Policy ", by Izumi Tetsu, in *The Japan Chronicle* (Kobe), printed in *The Peking Leader*, September 24, 1927.

[44] *Osaka Mainichi*, December 26, 1929; *Japan Times*, December 30, 1929.

These circumstances give evidence that the presidency of the South Manchuria Railway Company is —as it is so frequently referred to in Dairen, the head office of the company—a political plum, and that the entire management of the railway is strongly under the influence, at any given time, of the political party which happens to be in control of the Japanese Diet and the Ministry.[45] For several years past, the Associate Japanese Chambers of Commerce of Manchuria has been urging reforms " to raise all enterprises for opening-up the Manchurian resources above political partisanship ", and has criticized the instability of tenure of the president and vice-president of the railway company. It has pointed to the fact that there is a telling contrast between " the line of eleven presidents of the Railway Company in the course of twenty-three years and the line of thirty viceroys of India during two hundred and fifty years ".[46]

[45] That this situation has long been the subject of criticism, not only among Japanese in Dairen, but in the homeland, is, of course, evident. Almost innumerable plans have been proposed from time to time to effect a change with the object of making the South Manchuria Railway management more permanent. The criticism thus directed at the present system is in itself illuminating evidence of the rôle of the company as an instrument of Japanese policy in Manchuria. No one living in Dairen could regard the company as a private enterprise in the sense in which that term is used to designate a private business firm trading in China. (*Vide: China Weekly Review,* April 25; June 20, 1931.)

[46] *Manchuria Daily News,* December 13, 1930. Baron Sakatani, who, as Minister of Finance after the Russo-Japanese war, was largely responsible for the content of the articles of incorporation of 1906, has recently advocated the creation of an "Advisory Board", com-

There has long been criticism, too, of the so-called "four-fold" division of responsibility in the Japanese Government for its enterprises in Manchuria, particularly in relation to the railway company. Under the present organization, the Premier, as head of the ministry, is largely responsible for the appointment of the president and vice-president of the company and for supervising its administration and general policy. Since 1908 the South Manchuria Railway Company has been under the Ministry of Communications for purposes of rate-fixing. The company has no authority to provide for policing the areas under its administration since that power is exercised by the combined authority of the Governor of Kwantung and the commandant of the Kwantung garrison troops. The latter is in charge of the so-called "railway guards", while the former is director of the municipal police in the South Manchuria Railway areas. The commander-in-chief of the Kwantung garrison is responsible directly to the Ministry of War and the Chief of Staff, while the Governor of Kwantung holds office at the will of the Premier, being responsible to the Foreign Minister in matters of foreign relations.

Finally, the South Manchuria Railway Company has always maintained a department, under various

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posed of members chosen from five classes of persons, including a class of four of long experience in the company's service, this board to be of approximately twenty members and to continue to serve for seven years. This "Advisory Board", whose creation would necessitate a change in the articles of incorporation, would confirm candidates for the posts of president and vice-president.

titles such as " General Welfare " and now " International Affairs ", which is entrusted with authority to conduct negotiations with the Chinese authorities and the Chinese Eastern (Sino-Russian) and Ussuri railways. In its rôle in foreign relations, therefore, the company is more or less responsible to the Ministry for Foreign Affairs. It appears that, generally speaking, the Seiyukai has favored the strengthening of the power of the railway company, while the opposition parties have looked with favor upon concentrating political authority in the Kwantung Government.[47]

The appointment of Count Y. Uchida to the presidency of the South Manchuria Railway in June, 1931, has been hailed in both Japan and China as a step directed against the past policy of using the railway in Manchuria as a means for paying party campaign

[47] Dr. M. Sengoku, who in 1931 was succeeded by Count Uchida as president of the South Manchuria Railway, seems to have favored a curtailment of the powers of the railway in conducting formal negotiations of railway agreements with Chinese and Russian authorities. " Subject to the approval of the Government, Dr. Sengoku is reported to be inclined to make the railway a purely business enterprise and to strip it once for all of the political ramifications it has been engrossed with. Hitherto, the new chief of the railway points out, a pretty mess has been made about the company to the annoyance of all concerned because of the absence of a clear-cut division of work between the branches of the Japanese Government and the S. M. R. It is highly desirable, Dr. Sengoku stated on his arrival here last week, that the muddle of interferences be disposed of by means of a thorough understanding between them. Foremost in his tentative plan is transfer to the Foreign Office in Tokyo of all matters which by their very nature require negotiations between Governments." (*Japan Times*, December 30, 1927.) (Cf. Royama, M. in *Pacific Affairs*, November, 1930, p. 1025.)

pledges. Count Uchida is a man of distinguished position, a statesman reputed to be aloof from partisan politics, one who has served his country in the highest of official posts, having been three times Minister for Foreign Affairs, Japanese Ambassador at Washington and St. Petersburg, and Minister at Peking during the Russo-Japanese war.* There is in Japan a strong movement, led by such distinguished men as Baron Sakatani, which looks to the elimination of partisan politics from the management of the South Manchuria Railway Company.

The South Manchuria Railway Company, as has just been noted, is actually authorized by the Japanese Government to participate in negotiating agreements with the Chinese and Russian authorities in connection with railway matters, and, for this purpose, it maintains a separate department. In practice, however, the chief of the Railway Department or a member of the directorate, experienced in Sino-Japanese relations bearing on Manchuria, actually conducts negotiations. These agreements do not, of course, have the same status technically as treaties, but, in view of the political constitution of the railway company and the fact that these railway agreements, as in the case of loan contract agreements for the construction of Chinese railways in Manchuria, are of paramount political importance in the relations of the two governments, the distinction, for

* Mr. S. Eguchi, a man intimately acquainted with Chinese affairs especially through his services as head of the Sino-Japanese Cultural Association, was made vice-president.

practical purposes, is unimportant. Many posts in the South Manchuria Railway Company's staff are frequently filled by men who have had long experience in the service of the Japanese Foreign Office, and, a few, after a term with the railway, have returned to active diplomatic careers. The same is true of intelligence officers. Under these circumstances it would be patently unrealistic to regard the South Manchuria Railway Company as other than an agent of the Japanese Government in Manchuria.

In conclusion, it is not inappropriate to compare this semi-official company with other railway companies which have operated in China under one or another form of foreign participation. The South Manchuria Railway Company was admittedly modelled, in part, upon the precedent of the Chinese Eastern Railway—as that railway was organized before 1905.[48] In the main, the jurisdictional rights claimed by the former are those previously claimed by the Chinese Eastern Railway, though the Japanese Government have never assumed the right of

[48] "That it was modelled to a great extent after the Chinese Eastern Railway Company there seems little doubt." (T. Hoshino, in *Economic History of Manchuria*, p. 92.) Mr. Hoshino, however, properly noted that the powers conferred on the South Manchuria Railway Company were not as great as those given the management of the Chinese Eastern. Mr. T. W. Overlach, in his comparative study of railway finance in China, remarked: "Japanese control in South Manchuria, then, as based upon the railway concession inherited from Russia, is much similar to that exercised by Russia in all Manchuria previous to the Russo-Japanese War, although the South Manchuria Railway Company is much more of a commercial enterprise than the Chinese Eastern Railway." (*Foreign Financial Control in China*, p. 171.)

controlling the residence of foreign consuls in the cities along their railway lines in Manchuria, as did the Russians in Harbin. As for financial participation, however, there is now much more of actual Chinese participation in the Chinese Eastern than there has ever been in the South Manchuria Railway. Tsarist Russia actually ruled through the Chinese Eastern Railway in northern Manchuria, while the Japanese administrative system in South Manchuria is a complex one of interlocking services, services which operate under divided responsibility, and include the railway itself, the Kwantung Government, the Kwantung Garrison and the Japanese consular officials. But the Tsarist system which operated so effectively in Manchuria before the Russo-Japanese war has long since disappeared. Since 1924 the Chinese Eastern Railway has been technically under joint and equal control of the governments of China and Soviet Russia. The South Manchuria Railway system, however, with all its political ramifications, has always been a far more important and efficient commercial enterprise than the Chinese Eastern.

As for any analogy between the Japanese railway and other railways in China in which there is some form of foreign participation, it is apparent that there is none. The French-financed Yunnan railway in South China presented a picture of government association with a nominally private railway company, but over the lines themselves the Chinese Government retained the right of police and protection

from outside attack.[49] A somewhat similar association of government and business was evident in the contract for the German railway in Shantung. Here, however, as in the case of the Yunnan railway, the Germans were given no right to police the line or to undertake the establishment of municipal administration along its right of way.[50]

The fact is that, if one were to seek analogies with the South Manchuria Railway Company elsewhere, he would have to go far afield. In the British East India Company of the seventeenth century he would find at least the picture of a private company which had power in the Indies to negotiate treaties. But the South Manchuria Railway Company, in spite of its dominant influence in the economic life of South Manchuria, has, of course, not been formally given " the sole right of trading " in those parts. In more recent times in Africa one can point to suggestive illustrations of private companies which, like Janus of old, had two faces. But, while these, like the British East Africa Company, The British South Africa Company, the German East Africa Company, and the Royal Borneo Company, had one face which turned its benign (?) countenance to the natives, negotiating treaties with them, they also had another which turned with greater humility to the home government, which, in the opening of the nineties of the

[49] Cf. Overlach, *op. cit.*, p. 130. MacMurray, Vol. I, p. 129.

[50] Overlach, p. 146; MacMurray, Vol. I, p. 115. Since 1914, of course, the German rights in the Shantung railway and in the Kiaochow leased territory have been lost.

last century, finally abolished them. These were, however, in the main, properly private companies, in spite of their political authority. Nor did they seek to mask that political rôle.[51] This was, of course, in Africa, and in a period before such an arrangement as permits the Canadian Pacific Railway to possess a three-hundred-mile right of way in the United States, without any form of political administrative authority over it, was considered feasible. Nor is there analogy between the South Manchuria Railway and so-called "servitudes", which furnish trade outlets on the territory of another. There is a difference between a commercial right of way for a railroad running on the sovereign soil of another state and a railway which admittedly has broad political functions.[52]

[51] For a description of these hybrid politico-economic companies in Africa during 1890-1900, reference may be made to the excellent study by Professor Norman D. Harris, titled: *Intervention and Colonization in Africa*, pp. 87, 92, 179, 207.

[52] Professor C. G. Fenwick, however, would call both such situations "servitudes", and include the South Manchuria Railway. The term may be convenient, but applied to the South Manchuria Railway, it has little, if any, justification. (Cf. Fenwick, *International Law*, p. 281.)

CHAPTER IV

The Problem of Interpretation

1. A Criticism of Various Interpretations. In concluding an article on the results of the Kyoto Conference of the Institute of Pacific Relations, held in Japan during October and November of 1929, the author, who attended that conference, cited as among the "unfinished business" with reference to Manchuria "the legal and political rights, i. e., principally treaty rights, of foreign states in Manchuria".[1] He had in mind particularly the legal status of the South Manchuria Railway. Professor M. Royama of Tokyo Imperial University, in a subsequent article on the legal nature of the South Manchuria Railway "zone", cited the above quotation as evidence of the need for further technical studies of legal rights in Manchuria, and asserted that there is an "imminent necessity of a scholarly analysis of the nature of the administration of the South Manchuria Railway Zone".[2] The problem is of special importance, for it vitally concerns the relations of China and Japan in Manchuria, and is in itself so complicated that it is difficult to cite two students

[1] "Manchurian Questions at Kyoto," in *Pacific Affairs,* March, 1930, p. 265.

[2] Royama, M. "The South Manchuria Railway Zone", in *Pacific Affairs,* Nov., 1903, p. 1018.

of the subject who find more than a minority of points on which they can agree.

Much of this difference of interpretation springs in origin from the confused picture of the Russian rights in the Chinese Eastern Railway before 1905. But much more of it arises from the manner of reasoning to conclusions adopted by a half dozen writers who have addressed themselves to this subject. Japanese scholars, for example, are not agreed as to the legal limits of Japanese jurisdiction exercisable in the South Manchuria Railway areas. There is general agreement on one point, namely, that the important brief section of Article 6 of the original 1896 railway contract agreement (*La Société aura le droit absolu et exclusif de l'administration de ses terrains*), which is not to be found in the Chinese text, is applicable and is of nature to confer broad jurisdictional authority upon the Japanese. There is not agreement however, as to whether this right is sufficient to justify claims to exercise of judicial authority within the railway areas.

One major confusion has arisen from attempts to draw analogies between the situation which prevails in the South Manchuria Railway areas and the foreign " concessions " and " settlements " elsewhere in China. This reasoning by analogy, usually inexact, has led to the use by Japanese scholars of terminology to describe these railway areas which, while applicable to isolated situations within the railway areas, falls far short of describing the whole. Dr. Royama has recently summarized some of these

contentions, and has added his own description of the railway areas.[3] In so far as the descriptions by Japanese students of this Manchurian situation have come to the author's attention, the theories of interpretation which they propound may be grouped as follows:

1. *The Territorial Cession Theory.* This theory proposed by Dr. Ninagawa some years ago, holds that the South Manchuria Railway areas became the property of the Japanese nation in 1905; that the areas were ceded to Japan and that over it the Japanese Government can exercise the rights of territorial sovereignty. This contention was justified by Dr. Ninagawa on the ground that China transferred the right of stationing guards or police to protect the railway and its lands, and that this transfer was of a nature to confer criminal and civil jurisdiction upon the grantee, Japan.

2. *The Concession Theory.* This contention holds that, although the railway areas are not uniform in character, their general character is that of a foreign "concession", similar to "concessions" in the treaty ports in other parts of China. This was the view of Dr. K. Imai. He held that for all ordinary purposes of municipal administration the South Manchuria Railway could exercise complete authority, but that this did not extend to jurisdiction in criminal or civil cases where Chinese or foreigners were involved. Dr. Imai, however, drew a distinction between two types of area under the administration of the railway: (1) the lands belonging to the railway and necessary to its operation; and (2) lands set aside as "commercial" areas in such places as Mukden and Yingkow where foreigners might reside much as in a "concession" elsewhere in China.

[3] Royama, *op. cit.*, pp. 1030-1031.

3. *The Quasi-lease Theory.* This is the term given by Dr. Royama to the description of the South Manchuria Railway's status by Dr. T. Izumi. The latter held that the transfer by Russia and China of administrative rights to Japan was more than a granting of merely the "right to use", and more nearly of the character of a political lease, limited by a term of years, but otherwise without restriction as to the rights of administration which might be assumed by Japan. Noting some differences between this status and that of the Kwantung leased territory, however, Dr. Izumi concluded that the legal nature of the railway's areas was something "between a settlement and a lease".

Dr. Royama, likewise, holds that there is "a considerable amount of the element of lease in the nature of the zone".

4. *The Colonial Railway Theory.* This is a recent attempt at interpretation of the legal nature of the South Manchuria Railway areas by disregarding "legal technicalities". Dr. Nagao, who approaches the subject by defining colonial railways as "all railways in the colonies", attempts to show that the South Manchuria Railway areas constitute a Japanese colony, and that over them Japan has an "absolute and exclusive" right of administration. He arrives at his conclusions avowedly by disregarding treaty provisions and emphasizing what he characterizes as rights obtained by "usage".

This diversity of interpretation among Japanese scholars reveals why abroad there is confusion more confounded. Foreign consuls of whatever nationality, residing in Manchurian cities, are frequently as ignorant of the many-sided legal structure of the South Manchuria Railway areas as are most nonresident students of the question. Nor is there agreement among the better-informed officials of the South Manchuria Railway Company in Dairen as to the

most fundamental juristic questions involved. Their official duties naturally concern particular cases as they arise, and they have little or no occasion to study the situation in its entirety. During the Washington Conference it was obvious that neither the Japanese nor Chinese delegates presented any complete picture of the legal nature of the South Manchuria Railway and its areas. Consequently, the conference committee meetings were replete with ill-informed judgments, some of which emerged in the plenary sessions.

Before attempting to analyze in detail the legal interpretations summarized above, and to appraise them, two cautions must be emphasized. In the first place, it is imperative in a juristic study to seek interpretations on legal grounds and to avoid the method of seeking particular materials which may serve as legal justifications of preconceived nationalistic views as to what ought to be Japan's political rights in the South Manchuria Railway areas. There is a danger that a *de facto* situation, tolerated in practice, but not officially accepted by the Chinese Government, may thus be given the color of legality, or even the character of a *de jure* right. As to this first caution, it is useful to test the theories of those who have attempted to interpret the international legal status of this railway by inquiring into their presumptions.

In the second place, a far clearer picture of the real and, in fact, unique legal status of the South

Manchuria Railway may be had by refraining from seeking analogous situations.[4] Frequently, attempts to cram into categories called "concessions" or "leases" this the South Manchuria Railway and its areas fail simply because there is no one category, familiar in international practice in the Far East, which suits this railway administrative system. It is *sui generis*. No Japanese writers, for example, have ever sought to explain carefully that the South Manchuria Railway actually exercises administrative authority over no less than four or five separate types of territorial area, and that in each case their authority to do so is derived, in so far as it is clearly legal, from various sources. These areas vary especially as to their title, including ownership, long-term and short-term leases, lands acquired from Russia, and some even held by private Japanese persons but administered by the railway company. Rights vary, too, as to whether they are exercised in so-called "treaty ports" or in so-called "railway towns" never opened to foreign trade by the Chinese Government.

2. The "Territorial Cession Theory". The most completely untenable attempt to interpret the international legal nature of the South Manchuria Railway was that made by Dr. S. Ninagawa in 1913. He attempted to show that "the right to protect the

[4] The dangers of uncritical analogy in attempting to describe the international legal status of the Kwantung leased territory have been developed in the writer's volume: *The International Legal Status of the Kwantung Leased Territory*, Ch. VI, Sec. 1.

Railway Zone was transferred to the nation who holds the railway line, because this is inferred from the right to station railway guards " and that " the right to administer justice, both civil and criminal, being given over to Japan, ... the legal nature of the Railway Zone is nothing but a territorial concession ".[5] This summary is, however, a little inadequate: Dr. Ninagawa held that the area was actually ceded to Japan, and that Japan acquired unlimited administrative rights as of a sovereign over the territory.[6] How such a " cession " of territory is reconciled with the specific time limit for possession of the South Manchuria Railway by the Japanese Government is not explained. How the assumption that Japan's administrative rights in the railway areas are absolute and unqualified is reconciled with certain very clearly recognized rights of the Chinese Government with respect to the railway areas is equally unsolved. Dr. K. Imai, writing in 1915, showed the inconsistency of Dr. Ninagawa's contentions with fact and accepted legal rights of China, when he drew attention to the fact that if these areas were Japanese territory, in the same sense as the mainland of Japan, China would have a right to station consuls there and that, contrarily, it was evident that the very cities within the so-called railway zone can be opened to foreign trade only by the action of

[5] Summary of Dr. Ninagawa's contention as given by Dr. Royama, *op. cit.*, p. 1031.

[6] Ninagawa, S. *Japan's Rights in South Manchuria* (In Japanese, published by Shimidzu Book Company, Tokyo, 1913) pp. 97 ff.

the Chinese Government.[7] Dr. Royama cites this entirely untenable theory of Dr. Ninagawa as one of two which are " popular " in Japan, but which he regards as " not likely to find ready sustenance in the customary interpretation of international law and treaties ".[8] China's ultimate sovereignty, her right to recover the railway at the expiration of the time period specified in 1915, her special rights with respect to trial of her own nationals resident in the railway areas, and the lack of any provisions in any of the agreements providing for " cession " of this territory to Japan combine to make the so-called " Territorial Cession Theory " quite unacceptable in law.[9]

3. The " Concession Theory ". Of the various attempts at description of the legal nature of the South Manchuria Railway areas by Japanese scholars, that of Dr. K. Imai, published in 1915, is both the most realistic and tenable in international law. His approach to the study is juristic; he concerns himself with the source of Japan's authority to exercise administrative functions, both as derived from the Russian rights before 1905 and as flowing from all treaties to which Japan and China have been parties. His may be called the " Concession Theory ", by

[7] Imai, K. *Foreign Jurisdiction and Foreign Administrative Areas in China.* (In Japanese, published by Maruzen, Tokyo, 1915) pp. 246 ff.

[8] Royama, *op. cit.,* p. 1032.

[9] Cf. Nagao, S. *Colonial Railways.* (In Japanese, published by the East Asiatic Economic Research Bureau of the South Manchuria Railway, Tokyo, 1928) pp. 164 ff.

which is meant an interpretation of these railway areas in such a way as to draw an analogy with concessions or settlements administered by various foreign states in the treaty ports of China, as at Tientsin, Hankow and Kiukiang. While his analogy is imperfect, it does recognize with respect to the South Manchuria Railway areas one fact which is usually entirely ignored by the commentators; the lands administered by the railway company are not of uniform legal character. Dr. Imai, for example, notes the distinction between lands which are necessary and in practice actually used for the operation of the railway itself, and lands which are not so used, but which have been set aside as " commercial areas " where Japanese and other foreign nationals may reside and conduct business relations.

" The Railway Zone is a new system ", however, in the opinion of Dr. Imai, " and is often the cause of international dispute; but, in the author's opinion, due to long existence of treaties and practice, it seems most convenient and accurate to solve its nature by the standard of the legal relations of a concession." [10] Particularly within these so-called " commercial areas " set aside for the establishment of municipal administration under the direction of the South Manchuria Railway is this parallel, according to Dr. Imai, most nearly appropriate. He held that the land actually used by the railway itself, whether for maintenance of communications or for

[10] Imai, K., *op. cit.*, pp. 259 ff.

mining and other industrial purposes, had a status distinct from that of the " commercial " or municipal areas. Consequently, Dr. Imai suggested that it would be more accurate to denote the entire combined areas by the new term " Foreign Administrative Area " of the railway.[11]

On one particular point Dr. Imai properly emphasized an entirely tenable description of a legal attribute of Japan's jurisdictional rights in the railway areas. He drew a sharp distinction between ordinary municipal functions and the authority of the Japanese Government, acting through their consular officers, to subject Chinese and other foreign nationals living in the South Manchuria Railway towns to Japanese jurisdiction. He held that Japan has never obtained legally the right to try Chinese and foreigners in Japanese consular courts in the railway areas in cases where they were defendants. " Over the Railway Zone, as in a concession, the administrative power of the railway possessor is enforced, based upon the principle of *statutas realia,* and controls all persons and property; but it does not influence the matter of [court] jurisdiction. Consequently, as to court jurisdiction, just as elsewhere in China, consular jurisdiction of the railway possessor, together with that of other treaty powers, is carried on side by side, based on the principle of *statutas personalia.*" [12] Consequently, Chinese jurisdiction,

[11] Imai, *op. cit.,* p. 263.
[12] *Op. cit.,* p. 260.

for purposes of trying their own nationals when defendants, is also enforceable, provided that in the exercise of that authority there is no violation of the rights of the railway as possessor of the railway areas. Arrest of Chinese or of foreign nationals may be made within the railway areas only by Japanese police authorities, unless there is a specific waiver of that right in particular cases by the Japanese.[13] Attention will be drawn to the limit of rights possessed by Japan in connection with litigation concerning Chinese and foreigners in a subsequent section. Sufficient here to express general agreement with this particular interpretation of Dr. Imai.

As to Dr. Imai's general position, the authority of Professor Royama may be taken for the assertion that " while the views of the Chinese and other foreigners seem to be similar to Dr. Imai's settlement theory " his position is not favored by Japanese writers, although the opposing theories of Dr. Ninagawa and Dr. Izumi " are not likely to find ready sustenance in the customary interpretation of international law and treaties ".[14] Dr. Royama, it should

[13] Dr. Imai cites the case of the Korean murderer of Prince Ito at Harbin. The assassin was arrested by Russian gendarmes in the compound of the Chinese Eastern Railway station on the spot where the crime was committed. After examination of the accused in a local Russian court, he was turned over to the local Japanese consul for formal trial. Such circumstances, especially when one accused of crime is apprehended *in flagrante delicto,* require immediate apprehension, regardless of the nationality of the accused, by the local authorities who are in charge of police jurisdiction.

[14] Royama, *op. cit.,* p. 1032.

be noted, is speaking of " popular " views, including in this term those of Japanese publicists. In my numerous conversations with technical and well-informed officials of the South Manchuria Railway Company in Dairen over a period of years I have found almost complete agreement with the above views expressed by Dr. Imai.

But there is room for criticism of certain of Dr. Imai's contentions. In the first place, while it may be admitted that there are certain superficial similarities between the administrative powers of the railway company in their areas in South Manchuria and those exercised in various concessions in the treaty ports elsewhere in China, the analogy is, generally speaking, imperfect. This arises from two situations: on the one hand, so-called " concessions " and " settlements " are not of uniform character in Chinese treaty ports and there is no norm with which to draw the analogy. On the other hand, the South Manchuria Railway areas do not constitute one uniform area, but, in fact, are composed of no less than five distinct types of land holdings, the limit of administrative authority of the railway in each varying from the others. Dr. Imai, while drawing a distinction between the lands actually required for the use of the railway and the commercial or municipal areas also under the railway's administration in practice, failed to draw a distinction between the status of the railway's authority in so-called Japanese " railway settlements " (Mukden, Yingkow and Antung)

which have been established in treaty ports, opened to foreign residence and trade, and in those areas which have been set aside for municipal purposes along the line but which are not in towns opened by China to foreign trade. Much of the land administered by the South Manchuria Railway Company in Yingkow, for example, is actually held by private Japanese nationals, though the railway company administers the area. It is noteworthy that, because this is a treaty port, many of the titles held by private Japanese are actually perpetual lease titles. This is not the case with land in the so-called "railway towns" where the land titles extend only to the time limit of the railway contract period, to expire, that is, in 2002. Furthermore, there are many cases of lands acquired by the railway since 1905 which are in lease for thirty years only.

Finally, a foreign concession in a treaty port in China came to mean usually an area set aside for the residence of foreigners and *leased to a foreign state,* upon which land an annual tax was paid to the Chinese Government by the foreign state having the concession. When leases of particular pieces of land were desired within that area by foreign nationals or by Chinese such might be had only from the consular authorities of the power having the concession.[15] There are no such concessions in Manchuria, and the Japanese Government do not pay an annual tax of any sort on the larger percentage of the lands

[15] Hornbeck, S. K. *China Today: Political,* p. 469.

included within the so-called railway "zone"—a term which will be subject to criticism later.

While "settlements" are often confused with "concessions" in China, it is well to distinguish them, the international settlement at Shanghai being the only *important* example existent.[16] Here the land within the Shanghai settlement remains on the register of the Chinese Land Office; foreigners may acquire perpetual leases but not permanent ownership in freehold.

When these distinctions are drawn between settlements and concessions it is apparent that in South Manchuria the situation is comparable to neither. Foreigners may reside in the so-called Japanese "railway" settlements in Mukden and Antung, for example, as a matter of right, not on sufferance of the Japanese Government. The right is derived from China. Hence, the situation differs from a concession where foreigners may reside subject to the consent of the government holding the concession. There are no international settlements in Manchuria comparable to that at Shanghai. The International Commercial Area, for example, at Mukden, is distinct from the Japanese-controlled railway municipality adjoining it, but, as distinct from Shanghai, it is sub-

[16] Hornbeck, *op. cit.*, p. 469. *Vide:* Tyau, M. T. Z. *Legal Obligations,* etc., pp. 58 ff.; 150 ff. The following statement of Dr. K. Asakawa, therefore, becomes unacceptable: "The administration of the railway zone is much the same as the municipal administration of the national 'concessions' and akin to that of the 'settlements' in the treaty ports of China Proper." (Asakawa, K. *Yale Review,* Aug. 1908, p. 204.)

ject to Chinese police authority. These, to be sure, are details, but they illustrate the impossibility of drawing an analogy with concessions and settlements elsewhere in China. It would be far better, because less confusing, to use Dr. Imai's term "Foreign Administrative Areas" of the South Manchuria Railway, with the understanding that their status is unique.

4. The "Quasi-lease Theory". The so-called "Quasi-lease Theory", attributed to Dr. T. Izumi and others by Dr. Royama, is stated by the latter as follows: "His point is that any adequate interpretation of the nature of the Railway Zone cannot be found in the letter of the original treaty between Russia and China, and that the nature of the zone has been greatly changed by the actions of Japan since the war with Russia."[17] Dr. Izumi's own views as to the legal nature of the South Manchuria Railway areas are summarized by himself as follows:[18]

"The transfer of all rights in connection with the South Manchuria Railway in virtue of the Sino-Japanese Agreement ought not to be regarded as a mere transfer of ownership or of the right of use, of the said railroad. In fixing the term for the right to operate the railroad as the same as that for the lease of Kwantung, the Agreement can be construed as signifying that the Railway Zone was leased to Japan. At any rate,

[17] Royama, *op. cit.*, p. 1031.

[18] Izumi, T. *Essays on Recent International Problems*, p. 155. Cited by Dr. Royama. The latter notes that the term "quasi-sovereign" has been used by Dr. T. Minobe to explain the legal nature of the railway areas, "probably because he considers the nature of the zone as something more than a settlement".

the Russo-Japanese Treaty entirely changed the nature of the railway in South Manchuria. It was conceded by Russia to Japan, and the concession was formally confirmed by China. Thus the procedure of this transference was the same as that of a territorial concession between nations. This does not, however, mean that the Railway Zone is a regular lease, because such an assertion would be contrary to the realities of the administration of the zone. After all, the Railway Zone may be classified as between a settlement and a lease."

Dr. Royama seems partial to this interpretation of Dr. Izumi, concluding that there is " a considerable amount of the element of lease in the nature of the zone ".[19]

We have here unique terminology, foreign to international law. Failing to find adequate terminology to describe this unique status of the South Manchuria Railway areas, the term " quasi-lease " has been coined. Its use is justified by Dr. Izumi apparently from observing that the period for Japanese possession of the railway and a portion of its lands is limited in years by agreements with China. But his conclusions follow from false premises and derive their untenable character largely from confusing a superficial similarity to a political lease, like the Kwantung territory, with legal identity.

Russia could not transfer to Japan at the treaty of Portsmouth political administrative rights never originally possessed. Consequently, such rights as were legally transferred to Japan were only such as were clearly derivable from the original Sino-

[19] Royama, *op. cit.*, p. 1034.

Russian railway agreements, principally that of 1896. Whatever the Japanese Government may have done, as a matter of administrative policy, to provide for one or more organs to conduct municipal and other administrative functions within those areas after 1905, no rights could be conferred, as, for example, upon the South Manchuria Railway Company, which were not legally first possessed by the Japanese Government. It is impossible, therefore, to accept the view that the treaty of Portsmouth in any way " changed the nature of the railway " itself. China confirmed Japan in her acquisition only of the rights clearly possessed previously by Russia.

It is difficult to avoid the conclusion with respect to Dr. Izumi's attempt to describe the railway areas as a " quasi-lease " that it was derived, not from a legal approach to the subject at all, but from a superficial observation of the manner of exercise of Japanese authority. Having noted that the police function over the railway areas actually was exercised by the railway guards and police responsible to the Kwantung Government of the leased territory around Port Arthur and Dairen, he concluded that the railway areas and the Kwantung leased territory were but two expressions of the same thing.

Furthermore, when regard is taken for the historical development of the Kwantung leased territory and of the railway itself, it is obvious that it was only coincidental that the terms of the periods for possession of each are almost identical. The

conventional basis for each, however, is quite distinct. A political lease, such as the Kwantung leased territory, is a distinct international legal entity, which should not be confused with any form of railway concession such as the South Manchuria Railway. That the latter should have unique characteristics bearing on administrative rights of the possessor is the product of a series of conventional agreements originating with the 1896 railway contract agreement, quite uninfluenced by the conventional origin of the leased territory of Kwantung or by its subsequent legal history. This distinction in law between these two types of territory has always been drawn sharply in conventional agreements bearing thereon, most notably in the treaty of Portsmouth itself.[20]

It may be added, for further clarity, that the lands included within the Kwantung leased territory are not subject to change. The area today is exactly as it was in 1898. Not so the South Manchuria Railway areas, however, which are constantly enlarging through the acquisition by the company of additional lands adjoining the system by lease contracts, by mortgages acquired from local Chinese owners, or actually by acquiring ownership in freehold and in perpetual lease. The only " element of lease " contained in the South Manchuria Railway's areas is, upon close analysis, the various forms of private

[20] *Vide:* Young, *The International Legal Status of the Kwantung Leased Territory,* Chaps. VI and VII.

leasehold, some for five, some for thirty, some for ninety-nine years, possessed by the company, and these all have a status quite distinct from the *international political lease* which is the Kwantung territory. In the latter territory there is little or no question of authority to exercise all forms of administrative functions by Japan.[21] In the South Manchuria Railway areas, on the other hand, there is no such blanket authority. Far better, both for purposes of legal interpretation and for clarifying the real situation, call the South Manchuria Railway for what it is—a concession railway with a limited amount of political administrative authority—than to attempt to justify a questionably desirable policy by resort to liberties with legal method.

5. *The "Colonial Railway Theory"*. What has been termed the "Colonial Railway Theory" propounded by Dr. S. Nagao, recently a councilor of the South Manchuria Railway Company in Dairen, is, in reality, no legal interpretation of the railway's status at all. It deserves comment, however, because of its origin, its recency, its very attempt to disregard the question of original legal rights, and, most emphatically, because it illustrates an all too current practice in Manchuria of attempting to fit new legal situations into categories which suit the pet theories of the propounders. Dr. Nagao's thesis, which is the product of an academic study of colonial government pursued in Germany and a subsequent attempt to

[21] Young, *op. cit.*

fit the South Manchuria Railway into categories which suit his thesis, is introduced by this illuminating commentary: " On our part we should like to treat principally of the possibility of a colonial railway of influencing world economy and world policy, and, on this account, we feel averse to deviating from our original line of argument, thereby obstructing the course of our own discourse by higgling about legal technicalities." [22] (*Sic!*) Dr. Nagao has defined a " colonial railway " *conveniently* as " a railway in the colonies ". The South Manchuria Railway areas constitute a Japanese " colony ": hence, the railway is a colonial railway! This recalls John Stuart Mills' criticism of the syllogism: it takes for granted what it intends to prove.

Dr. Nagao, who doubts the positions taken by Dr. Ninagawa and Dr. Imai, failing to find in their arguments justification for including within the South Manchuria Railway areas, pieces of land distant from the railway itself but actually administered by it, seeks to find justification for including in the railway's areas such sections as are " directly intended for the development of Japan's policy to contribute to the world economy, *viz.*, the Company's land along the railway, such as those purely commercial quarters at Mukden, Changchun, etc." [23] This right, he concludes, should be clearly derivable, in the first instance, from international conventional agree-

[22] Nagao, S. *Study of Colonial Railways,* pp. 164 ff. (In Japanese.)
[23] *Ibidem.*

ments. Failing such authority, he contends that " the origin of rights and obligations between any two countries is by no means confined to treaties ". In the case of the South Manchuria Railway, " Chinese acquiescence " must be relied upon. " In other words, the origin of the right handed over by Russia to Japan concerning the South Manchuria Railway area should not be sought in any existing texts to be treated deductively, but the same subject must be worked out inductively from the unwritten law, and from a broader viewpoint." [24] Dr. Nagao concludes that to justify the inclusion of areas not actually necessary for the operation of the railway within the administrative authority of the company it is necessary to rely on " usage ". Usage means change, he continues, and rights vary accordingly. His conclusion: " The railway area, even though not Japanese territory, is a zone in which Japan's right of administration is perfectly operative, absolutely and exclusively." He concedes that judicial authority, however, in so far as possessed by Japan, is derivable only from consular jurisdiction under extraterritoriality.

The South Manchuria Railway, in Dr. Nagao's conclusion, has become by usage, acquiesced in by the Chinese, a railway not solely for communication purposes, but an institution " for the additional purposes of developing Japan's policy to contribute to world economy ". " Thus, the South Manchuria

[24] *Ibidem.*

Railway wears a colonial character in the deepest color ", according to Dr. Nagao, and it may be regarded as an ordinary colony. A better illustration of fallacious reasoning by the syllogistic method would be hard to find: Dr. Nagao began with an assumption which, while invalid in fact, is identical with his conclusion—an untenable hypothesis.

The Japanese Government have always been careful in official reference to the Kwantung leased territory and the South Manchuria Railway areas to avoid reference to either of them as colonies. While, for purposes of fitting them into the Japanese constitutional system, they are both grouped with Taiwan and Chosen for convenience, they are not regarded as colonies, in the sense in which the term is used in international law and relations. Legally, and in a most practical sense, the Imperial Japanese Railways of Chosen have an entirely different status from the South Manchuria Railway. The former is the property of the Japanese Government and is built entirely on Japanese soil over which Japanese sovereignty, complete and unqualified by reserved administrative rights, prevails. The term " colony " is, to be sure, an expression having no precise international legal definition. But it is difficult to see what beneficial purpose may be served by applying it to the South Manchuria Railway for other than convenience. Dr. Nagao has contributed nothing but strong opinion to an interpretation of the legal nature of this railway, and it is apparent that his opin-

ion has had little or no influence upon more cautious Japanese publicists.

6. The Necessity of Distinguishing Administrative Forms and Juristic Bases. The views of Japanese publicists or writers who have addressed themselves to the subject of the legal nature of the South Manchuria Railway areas, almost invariably termed by them " the railway zone ", seem to fall into one or another of the four categories described above, or to range around them with incidental disagreement. Dr. M. Royama's analysis has been purposely reserved for final attention here because it is the most recent, and can hardly be said to constitute an interpretation of the legal bases for the juristic rights possessed by the railway company or associated Japanese bodies. It is quite obvious that Professor Royama has found fault with each of the first three theories to which he has drawn attention, but, by concluding that there is " a considerable amount of the element of lease in the nature of the zone " he associates himself most clearly with the " Quasi-lease Theory " of Dr. T. Izumi.[25] But to symbolize Professor Royama's interpretation by any single descriptive title is impossible; he prefers to approach the subject by observing the actual administrative relations between the Kwantung Government and the South Manchuria Railway and by so doing to attribute to legal right what is an accomplished fact in practice.

[25] Royama, *op. cit.*, p. 1031.

Professor Royama has given but incidental attention to the legal nature of the South Manchuria Railway areas; he confines himself mainly to a description of the actual nature of the Japanese administrative system there, emphasizing throughout that this must be studied in conjunction with the government of the Kwantung leased territory. Although, in a purely administrative study of the Japanese position in Manchuria, this approach is highly desirable, for the administrative systems of these two distinct areas are closely interwoven, it serves here but to confuse the distinct legal character of each. In so far as Professor Royama does suggest the legal nature of the South Manchuria Railway areas it is apparent that his conclusions are influenced throughout by the actual rôle of the Kwantung Government in exercising the function of police over the railway's lands.[26] "... As a legal interpretation of the actual state of the Railway Zone, any interpretation which regards the status of the Railway Zone as inferior to that of the settlements in other parts of China is contrary to the fact and cannot reasonably be sustained. The question has always been whether the real status of the zone should be considered as being similar to that of the leased territory and superior to or at least not less than that of the settlements".[27]

There is, it may be said, little to be derived by way of an interpretation of the legal nature of the South

[26] *Ibidem*, pp. 1019, 1022, 1027, 1032 ff.
[27] *Ibidem*, p. 1027.

Manchuria Railway areas from characterizing the rights of Japan as either *inferior* or *superior* to the status of authority in so-called settlements or concessions elsewhere in China. This but confuses. Professor Royama, however, seems to mistake the actual practice in the various municipalities in the South Manchuria Railway areas when he presumes that it is almost analogous with that of the Kwantung leased territory. While it is generally conceded that foreign consuls residing in Dairen, since they receive their exequaturs from the Japanese Government, not China, have no right to act in a judicial capacity to try cases involving nationals of the country they represent, the situation is, in practice and in law, quite different in the South Manchuria Railway areas. A British or American national, for example, who resides in the Japanese-administered "railway settlement" in Mukden is not subject to trial in a Japanese consular court if he is a defendant against either a Chinese or a Japanese.[28] There is nothing

[28] At the Washington Conference (1921-22), when the subject of foreign post-offices in China was under consideration in a subcommittee, an attempt was made by Mr. Hanihara to group the South Manchuria Railway and the Kwantung leased territory under the same rubric, contending that, inasmuch as Japan fell heir to the previous Russian rights in both these areas by virtue of the treaty of Portsmouth, the status of Japanese post-offices within them was essentially the same, i. e., derivable from previous treaty rights of Russia obtained from China. The Chairman (Senator Lodge), however, expressed the opinion that there was a distinct difference between leased territories and railway contracts, such as that for the South Manchuria Railway (originally, the Chinese Eastern Railway). Mr. Hanihara then asserted that so far as Japan's administrative rights were concerned they were practically the same as in the leased

to be derived from characterizing the Japanese authority as either " inferior " or superior; the fact is simply that it is different from that exercised by the government of a state having an exclusive concession in a Chinese city.

Nor is it readily possible to admit that the question underlying all studies of the legal nature of the South Manchuria Railway has always been whether

territory. Senator Lodge then specifically inquired whether Japan had, in addition to a right of way in the railway areas, also a lease of territory. Mr. Hanihara replied that Japan had administration not alone over the tracks and physical equipment of the railway, but also administrative rights over a strip of land on either side, and that that strip had the same status as leased territory, carrying with it every kind of authority, including taxation, police and postal administration. Senator Lodge replied that that might be called a "right of way".

The discussion illustrates especially two things. First, the fact that the attempted grouping of the Kwantung leased territory and the South Manchuria Railway areas under the same rubric failed of approval by the sub-committee, and therefore, by the Conference. In the second place, it illustrates how both parties to the exchange of views, cited above, dealt with generalities, without regard for vital facts which apparently were not presented to the Conference. No mention was made, for example, of the fact that, while the Japanese Government are entitled to exercise judicial authority over foreigners residing in the leased territory, the same right is absent in the South Manchuria Railway areas. Commenting on this discussion in the sub-committee, Dr. W. W. Willoughby has made the remark that "it was expected that the rights of Japan within railway zones would receive further discussion when the subject of railways in China was taken up by the Conference—an expectation that was not realized". (*China at the Conference*, p. 135.) In fact, except for this discussion of postal administration, and that of the Japanese railway guards, the subject of Japanese administrative rights in the South Manchuria Railway areas was hardly touched upon by the Conference at all. Diplomacy evidently cautioned the Conference to refrain from passing judgment on so controversial an issue.

it was similar or dissimilar to that of the Kwantung leased territory. Except for such contentions as that of Dr. T. Izumi, detailed above, it has generally been admitted that the two territorial possessions of Japan in Manchuria should not be confused. This has always been the attitude of the Japanese Government, sustained by its consistent reference to these two types of area in international correspondence. The pertinent question is simply: What is the exact legal nature of the South Manchuria Railway areas? It becomes quite impossible therefore, to accept Professor Royama's statement that "whatever may have been the Japanese Government's intention on the occasion of the conclusion of the treaty, the actual administration since then unmistakably reveals Japan's attitude, which considers the Railway Zone as nothing but an extension of the lease of Kwantung province".[29] The views of a dozen Japanese officials of the railway and of the Kwantung Government in Dairen and Port Arthur, expressed to me on numerous occasions, particularly in 1927 and more recently in the autumn of 1930, are unanimously in agreement that the legal status of the Kwantung leased territory is quite distinct in origin and kind from that of the South Manchuria Railway areas. This has always been the official view of the Japanese Government.

Dr. Royama asserts that the anxiety of the Japanese Government that such attempts at interpreta-

[29] Royama, *op. cit.*, p. 1032.

tion of the legal nature of the South Manchuria Railway areas as given by Dr. Ninagawa and Dr. Izumi " are not unlikely to find ready sustenance in the customary interpretation of international law and treaty " is one of the reasons why " the Japanese Government has been trying to avoid a judicial settlement by a third party and is not quite willing to adopt the optional clause of the International Court of Justice ".[80] He concludes therefore, that " any attempt . . . . to explain the nature of the Railway Zone merely from the viewpoint of international law and treaties would be futile ". Of this there can be no doubt, if by the nature of the areas one refers to the form of administrative system and the actual functions exercised by Japanese authorities in these areas. If, however, by the nature of the so-called " zone ", we mean its international *legal status,* then it must be apparent that there is no means for establishing legal rights except by reliance on such treaties as are applicable, and by recourse to such rules and principles of international law as may be found appropriate.

In concluding this commentary on Professor Royama's interpretive article there may be more than incidental purpose in quoting his final sentence: " . . . . The problem of the Railway Zone cannot be solved purely and simply by interpretation of treaties and facts, but will require a greater political solution, exacting the coöperation of and collabora-

[80] Royama, *op. cit.,* p. 1032.

tion not merely of China and Japan but of all nations whose gates open on the Pacific Ocean". Legal analyses applied to such highly controversial conflicts of policy as prevail over the South Manchuria Railway can furnish but a partial foundation of known fact upon which diplomatic negotiations can build solutions. The clearer the real legal character of this railway becomes, however, the closer the agreement between China and Japan as to the legal rights of each involved, may be, and the more readily will it be possible to proceed, with some hope of eventual solution, in the actual conduct of negotiations.

It will be noticed that no attempt has been made as yet to analyze views held by Chinese writers concerning the legal nature of the South Manchuria Railway areas. The reason therefor is simple. While competent Chinese writers have written excellent works on the political history of Manchurian international relations,[31] there appears to be no authoritative study in Chinese of the legal nature of the South Manchuria Railway and its lands. The general works contain incidental reference to particular legal phases, but do not attempt any thorough study of the legal nature of the railway. It is very noticeable, moreover, that the great majority of articles written by Chinese on the legal phases of the South Man-

[31] Among recent Chinese writers who have contributed much to an understanding of the political history of Manchuria the following scholars are foremost: Dr. Ming-ch'ien Joshua Bau, Dr. Ching-lin Hsia and Dr. Shu-hsi Hsü.

churia Railway is so uncompromisingly nationalistic that what may generously be called their legal method usually resolves itself into a utilizing of selected portions of international law to suit their individual interpretation. Treaties are frequently quoted where they may be cited to serve a preconceived notion, and pertinent articles and sections are omitted even when they are to be found in the very context from which their selected references are cited. This is not the method of law, but of propaganda. Because there *does exist* a firm legal ground upon which the Chinese can establish a claim to a limited amount of political administrative authority in the South Manchuria Railway areas, it would seem much more desirable, even from a policy standard, that they preserve intellectual honesty, and rely on legal method to establish their claim to legal rights in the South Manchuria Railway areas.[32]

[32] While the manuscript of this volume was in press my China mail brought the current issue of *The Chinese Social and Political Science Review* (April, 1931) which contains an article by Professor Hsü Shu-hsi of Yenching University on "The Status of the Railway Settlements in South Manchuria". This article is a criticism of Professor M. Royama's article, analyzed above in the body of this chapter, which was published in *Pacific Affairs* (Honolulu) in November, 1930. In the light of Dr. Hsü's article, I find no reason to alter the conclusions I have drawn in text above. In the main, I find his criticisms of Dr. Royama's methodology and interpretation entirely acceptable. In fact, it is coincidental that his principal criticisms are identical with those made in the body of this chapter. Certain other criticisms made by Dr. Hsü in this article have also found support in the following chapters of the present work, as, for example, his assertion that the term "railway zone" is inaccurate and deceptive.

Considerable more by way of illustrative fact than has hitherto been presented needs to be given before valid conclusions can be drawn with regard to the real legal nature of the South Manchuria Railway and its areas. Enough has been given, however, to caution the student against hasty generalizations and to suggest that the legal nature of this railway is quite without parallel. Such a body of illustrative fact, necessary to establish an adequate basis for specific description, may be elicited through the attempts, contained in subsequent chapters, to answer

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Summarizing Dr. Hsü's principal criticisms, in so far as they apply to the chapter above, one may note first his agreement with the author that Professor Royama "determines the status of the Railway Settlements by the nature of their administration", and, by so doing, confuses one with the other. Dr. Hsü uses strong language to make his point: ". . . . It is certainly beyond one's comprehension to find oneself invited in a 'scholarly analysis' of a subject to assume some basis convenient to the author, and told to interpret everything in accordance with it." His criticisms of Dr. Royama's description of the relation of the South Manchuria Railway Company to the Japanese Government are not germane here. He properly calls attention to the inconsistency of the argument which confuses the very different legal bases for the claim of right to establish consular police in the interior and that to establish "railway guards" along the South Manchuria Railway. Professor Royama seems clearly to confuse administrative policy with fundamental international legal right when he asserts that Japan had, in some way, obtained a *legal right* to establish police within the railway areas because of the "application of law as well as actual procedure".

As for judicial authority, Dr. Hsü agrees with Dr. Royama and the author that such judicial rights as are possessed by Japan in the railway areas (as elsewhere in Manchuria) are derivable solely from the existence of Japanese extraterritorial treaties with China. All quotations above are from the *Chinese Social and Political Science Review*, Vol. XV, No. 1 (April, 1931), pp. 29-47.

the following questions: What is the meaning of the term, the South Manchuria Railway "zone"? Is there agreement between China and Japan as to the areas actually at present under the administration of the South Manchuria Railway Company? Is the status of the so-called "railway settlements" at Mukden, Antung and Yingkow comparable with that of "concessions" or "settlements" elsewhere in China? By what means has the South Manchuria Railway enlarged the areas under its jurisdiction? Is Japan's right to police the railway areas valid and different from that previously exercised by Russia? What are Japan's rights to levy and collect taxes from Chinese and foreign nationals in the railway areas? What is the legal basis for Japan's exercise of judicial authority, and does it extend over Chinese and foreign nationals residing in the railway areas?

CHAPTER V

The Character and Growth of the South Manchuria Railway Areas

1. The Real Meaning of the "South Manchuria Railway Zone". Much of the misunderstanding and many of the numerous international incidents which have arisen between China and Japan over the question of the South Manchuria Railway have sprung from disputes as to the very geographical areas over which the Japanese Government has assumed jurisdiction. To this basic cause of international friction numerous others pertaining to the relations of Japan and China in the areas traversed by the South Manchuria Railway have been added in the quarter century of Japanese possession. The result is a situation which would be cleared of much confusion were the actual legal rights of each state clearly defined. Actions in pursuance of valid legal rights may be presumed by the critics to be actions beyond the scope of existing rights. Again, what may be presumed to be legal actions may be, in fact, entirely untenable unilateral practices unsanctioned by legal rights. The heart of the so-called "Manchurian Question"—which is in reality a complex series of interrelated questions—in so far as the relations of Japan and China are concerned, is the South Manchuria Railway.

Before proceeding, then, to describe the so-called "South Manchuria Railway Zone", it is well to suggest the importance of the various questions of jurisdictional right which have arisen, and are constantly arising today, in connection with this railway. On no subject in Manchuria has there been more confusion as to fact, more difference of opinion as to interpretation of treaty provisions, more resulting "incidents" giving rise to diplomatic controversies, and more bitterness, suspicion and even hatred, than concerning this railway. The rancoring rebuffs which local Chinese officials have suffered at the hands of Japanese soldiers, police and consular officials throughout the South Manchuria Railway area, and the questionable assumption of jurisdiction by Japanese officials in native villages adjoining the Japanese railway towns, have been matched on the Chinese side by their own confused system of local government, the incompetence of local officials in municipal administration, and the occasional ignorance and irregular practices—including acceptance of bribes and "squeeze"—of the local Chinese officials.

Fully a hundred so-called "incidents" between Japanese officials, usually the railway police, and local Chinese authorities in or adjoining the South Manchuria Railway areas have occurred in the last twenty-five years. A few of these will be referred to, each in its place. Many of these disputes have arisen over the basic question of the geographical

limits of Japanese jurisdiction; many, too, over mooted areas of concurrent jurisdiction. Few, if any, have been settled by a resort to strictly legal methods. None has ever been settled by third parties, either by arbitration, conciliation, adjudication or otherwise. There is no agreement as to the legal limits of the jurisdictional rights of the Japanese authorities. The result has been that adjustments have not taken the form of definitive settlements. The investigator is, therefore, confronted with a body of *de facto* situations which almost defy the resourcefulness of the scholar to appraise their permanence or legal validity. Appended here, to introduce the reader to these irregular legal practices prevalent in the last quarter century of Manchurian diplomacy, is a statement made to the writer by Mr. Lou Wen-kan, who in 1928 became an adviser to Marshal Chang Hsueh-liang, Governor-General of the Manchurian provinces.[1]

"The important fact to consider with regard to the rights exercised by the Japanese in the South Manchuria Railway areas is that these rights have been acquired more by usage than by specific grant in bilateral treaties or agreements between China and Japan. The Japanese have acted on the assumption that, because the Russians exercised certain administrative functions in the Chinese Eastern Railway areas before 1905, Japan acquired similar rights along the South

[1] Mr. Lou Wen-kan has held high offices in the Peking Government. He has been Minister of Finance and Minister for Foreign Affairs. After serving in the Peking Government of the late Marshal Chang Tso-lin he has since been a principal adviser to the son, Chang Hsueh-liang. He was once a student at Oxford.

Manchuria Railway by virtue of the treaty of Portsmouth. This contention is tenable only to the degree to which China actually sanctioned the exercise of administrative rights by the Russians, and to the degree to which these presumed rights have been recognized by usage, usage which may establish a legal right in fact. That China questioned the exercise of administrative authority by the Russians in the Chinese Eastern Railway was evident before 1905, but more evident after the question of the Harbin municipality arose in 1908.

"There is today, however, a situation which complicates the whole question of the Japanese rights. Very probably secret agreements were negotiated by the late Marshal Chang Tso-lin's government at Mukden with the Japanese authorities, agreements which the Chinese officials, who negotiated them, have for personal reasons kept secret, even from the Foreign Intercourse Office at Mukden. I myself had occasion to come across a great many irregular settlements which the Chinese made through Mukden of questions which gave the Japanese special rights in certain land cases which were never sanctioned by any of the treaties.

"The Chinese local authorities, especially under the government of the late Marshal Chang Tso-lin, were inclined to settle such cases, especially when hard pressed by the Japanese for a settlement, without much regard to whether or not the treaties sanctioned such action, and as a natural result of the Chinese characteristic of careless disregard for the formalities of treaties and of the desire to settle individual cases on their own merits, or to avoid friction. Consequently, the records of the Foreign Intercourse Office in Mukden are incomplete and scattered. It is almost impossible to ascertain exactly what rights have been sacrificed in one way or another by these irregular settlements without the sanction of the Peking Government."

So prevalent has become the use of the term "South Manchuria Railway Zone" to designate

the land actually owned, leased or administered by the railway company that little attention has ever been drawn to its real meaning. Either it is thought to be a clearly defined zone extending widely, and more or less uniformly, on both sides of the South Manchuria Railway itself, or it is considered to be but a narrow ribbon of land,[2] hardly more than a railway right of way. Both views are quite incorrect. Along the railway tracks themselves, and between the various town-sites, the so-called "railway zone" is hardly more than a narrow ribbon of land —varying from fifty to three hundred feet on either side—somewhat narrower, generally speaking, along the Antung-Mukden branch.[3] But the railway areas

[2] Mr. Hanihara, in a meeting of the sub-committee on foreign post-offices in China at the Washington Conference, described the South Manchuria Railway area as a "narrow strip of land" on either side of the railroad tracks.

[3] The desire of a score of writers, correspondents and scholars, to divulge the truth as to the *exact width* of the railway right of way along its tracks has, unfortunately, only led to so many diverse positive statements, no one of them reconcilable with the others. The fact is that to say that this right of way varies in width from fifty to three hundred feet on either side of the railway tracks (for the main line) is not to say that even this is invariable. The width constantly varies. One might offer the admonition: "Follow the White Stakes"! These, at times, make detours like the "red lights" in the subway to the Pennsylvania Hotel! One explanation is that, when the line was double-tracked shortly after the Russo-Japanese war, the South Manchuria Railway Company found it necessary to straighten the line, and, in order to do that, to acquire additional tracts of land by purchase from the local owners. The result is, of course, that, in several places, comparatively large arcs of land from points on the present line describe the actual extent of the right of way. It may also be noted that, between Hunho and Suchiatun, two stations south of Mukden, the right of way widens to a very considerable distance from

which comprise the enlargements situated at the various towns along the route are the really important portions of this so-called "railway zone" for all purposes of jurisdictional study.

By far the larger part of the railway's lands are in these enlargements within which the Japanese Government, through the South Manchuria Railway Company, the Kwantung Government and the Japanese consular service, exercise practically exclusive administrative authority. These enlargements exist at the following cities: Mukden, Changchun, Ssupingkai, Liaoyang, Tashihchiao, Anshan, Wafangtien, Kaiyuan, Kungchuling, Fushun, Yentai, Penhsihu, Yingkow (often called "Newchwang") and Antung. These town areas are usually referred to locally by foreigners as the "Japanese settlements" to distinguish them from the native Chinese towns adjoining, or from such an international commercial area as exists at Mukden. They are not, however, "settlements" in the sense in which that term is used elsewhere in China. There are no "international settlements" in Manchuria comparable to that at Shanghai: its nearest parallel is the International Commercial Area at Mukden. Finally, a distinction must be drawn between the so-called "Japanese railway settlements" at Mukden,

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the ordinary right of way, this being due to the fact that, from these stations, branch lines proceed to the Fushun coal mines. In view of these circumstances, it would be quite impossible to picture the exact variations on any ordinary railway map.

Yingkow and Antung and the ordinary " railway areas " along the line of the South Manchuria Railway.[4]

There is no South Manchuria Railway " zone " in the sense that any international document has used the term to apply to an area specifically delimited by mutual agreement between China and Japan. Not only is the area of the South Manchuria Railway's lands not delimited by agreement, but it is constantly, though slowly, expanding in size, a procedure which is entirely in accord with the original 1896 railway contract, taken over by Japan, which provided that lands might be progressively added for the use of the railway. The term used in the early agreements referring to the lands of the railway is more accurately translated " attached lands " than " zone ", the term reading *fu-shu-ti* in Chinese or *fuzokuchi* in Japanese. Although the term " railway zone " is used almost invariably by Japanese writers to refer to the South Manchuria Railway's lands, and very frequently by Chinese and foreign writers, it is, in fact, a misnomer. Its use creates a presumption of a well-defined area, limited to a uniform width on either side of the railway itself, a presumption which is entirely contrary to fact. Moreover, it suggests a region of political control by Japan, and creates the additional presumption that within that area the jurisdictional rights of Japan are of a uniform character. If, then, the term " railway zone "

[4] *Vide:* Chapter VII.

be used at all, for the sake of convenience, it should be employed with the understanding that the territory so designated is not sharply defined, that it is changing in size and character from year to year, that most, but not all, of the lands so described are under the administration of the South Manchuria Railway Company, that portions of these lands are possessed for the full term of ninety-nine years, while others are held only in the form of the prevalent thirty-year lease period, and, finally, that the area of the so-called " railway zone " is so irregular in shape as to make pictorial representation of it impossible.

While it has frequently been asserted—as at the Manchurian round tables of the Kyoto Conference of the Institute of Pacific Relations in 1929—that the boundaries of the South Manchuria Railway " zone " are " clearly defined ", it is quite evident that any careful investigation of the real character of these lands shows the contrary. The official figures of the South Manchuria Railway Company, describing the area of the " railway zone ", do not state clearly what types of area are included within the total figure. The latest available figures place the total area of the South Manchuria Railway lands in Manchuria, and outside of the Kwantung leased territory, at 108 square miles.[5] The so-called " rail-

[5] Exactly 280,099,085 square meters, according to figures supplied to the writer in Dairen, November, 1930, by the International Affairs Department of the South Manchuria Railway Company.

way zone ", therefore, is not geographically large, a fact which is no indication of its political significance. The largest compact areas are situated in the Fushun colliery district and adjoining the Anshan iron and steel works (both under control of the railway company) and in the municipal enlargements at Mukden, Kungchuling, Kaiyuan, Tiehling and Liaoyang.

The fifteen largest single areas belonging to the South Manchuria Railway Company, outside the Kwantung leased territory, are listed below in order of size, the tables giving the entire land areas at each place under the administration of the railway company, subdivided into the municipal areas and the lands actually used for the railway itself.

	Town	Municipal area	Used by railway	Total sq. meters
*1.	Fushun	797,261	229,465	58,937,809
*2.	Anshan	10,898,737	742,389	19,875,839
3.	Mukden	9,570,956	1,330,137	10,901,094
4.	Kungchuling	6,036,830	622,493	6,659,323
5.	Kaiyuan	5,899,800	729,997	6,629,797
6.	Tiehling	5,034,584	1,177,812	6,212,396
7.	Liaoyang	5,447,740	644,344	6,112,084
8.	Ssupingkai	4,768,691	573,604	5,342,295
9.	Changchun	3,881,040	1,170,590	5,051,631
10.	Hsiungyaocheng	4,250,860	217,677	4,468,537
11.	Antung	2,768,917	1,419,284	4,188,202
12.	Tashihchiao	2,984,275	441,588	3,806,923
13.	Changtu	3,387,285	231,914	3,619,200
14.	Hsuangmiaotzu	3,141,919	297,700	3,439,619
15.	Kaiping	3,143,734	189,180	3,332,914

*It will be noticed that the sum of the municipal area and that used by the railway at Fushun and Anshan does not equal the total under the railway's administration; the balance is, in the case of Fushun, the area of the coal mines; in the case of Anshan, the area of the iron works, both operated by the South Manchuria Railway.

Inasmuch as these figures have apparently never been published in English text, it is hoped that the difficult task of ferreting them out of the *Statistical Annual,*[6] published by the South Manchuria Railway in Japanese, may serve to clarify just where the areas lie which are under the railway's administration, and what are the relative sizes of these areas. First, it will be observed, is the land possessed by the railway at the Fushun collieries, an area of roughly 14,000 acres, of which the mines themselves cover territory far larger than that occupied by the Fushun municipality and the other railway lands under the company's administration. A somewhat similar situation prevails at Anshan, where the leading iron works of Manchuria are located.

The largest municipal area, except Anshan, administered by the South Manchuria Railway Company in the so-called railway "zone", is at Mukden, where the area, termed "Japanese settlement" by local residents, covers nearly 2,400 acres. In comparison with Mukden, the area under Japanese administration at Antung, on the Manchurian-Chosen border, is small, while that at Yingkow does not fall within the classification of the fifteen largest areas along the railway and under its jurisdiction. The areas in the vicinity of the Yentai collieries and the

[6] *Local Administration Statistical Annual:* 1930, pp. 74-77. (Published in Japanese by the South Manchuria Railway Company, Local Affairs Department, Dairen.)

Penhsihu coal and iron works are likewise small in comparison.

These figures seem sufficiently clear, but they do not clarify the remaining confusion as to the types of area thus included. The fact is that, if they refer only to lands under the administration of the railway company, they give no indication of lands possessed by the company, in one form or another, but not under their administration. There are numerous such areas in South Manchuria. Again, if they refer to lands both possessed and administered by the railway company, it is evident that the areas thus designated as 108 square miles are not entirely subject to Japanese jurisdiction. This has never been made clear in published works in any language, but that it is an important consideration in any attempt to describe just what the South Manchuria Railway areas are, will be apparent from a careful reading of the following categories of land either possessed or administered by the South Manchuria Railway.

1. Lands acquired by Japan in 1905 under the terms of the treaty of Portsmouth and the treaty of Peking (December 22, 1905) as transferred by the Russian Government, including only lands formerly validly possessed by the Chinese Eastern Railway as part of their railway areas.

2. Lands acquired during and after the Russo-Japanese war by the Japanese military, either by (a) appropriation or confiscation, or (b) by purchase from local Chinese owners.

3. Lands acquired by the South Manchuria Railway Company by "purchase" (actually long-term lease) from local Chinese owners, under the terms of Article 6 of the 1896 railway contract agreement between Russia and China.

4. Lands acquired by the South Manchuria Railway Company in the form of thirty-year leases, either (a) under local arrangements made with Chinese owners before 1915, or (b) under similar arrangements after 1915, and, presumably in pursuance of the Sino-Japanese exchange of notes of May of that year.

5. Lands acquired, and actually possessed in perpetual lease, by the South Manchuria Railway Company in the "open ports", as in Mukden, Antung and Yingkow.

6. Lands *not possessed by* the South Manchuria Railway Company at all, but under the company's administration; including perpetual lease land held by private Japanese subjects at such places as Yingkow and Antung, these lands having been turned over to the railway company, by the Japanese Government, solely for the purpose of establishing a municipal administration over these compact areas where the population is almost exclusively Japanese.

The importance of these distinctions in a study of the jurisdictional rights of Japan in areas belonging to or adjoining the South Manchuria Railway will be evidenced by noting especially categories four, five and six. The first three categories, generally speaking, are subject to such jurisdiction by Japanese authority as is derivable from the original Sino-Russian, and the subsequent Sino-Japanese agreements pertaining to the South Manchuria Railway. Lands acquired by the South Manchuria Railway, however, in the form of thirty-year leases, whether adjoining the railway or not, take on an entirely different character from the ordinary lands held for the full term of the ninety-nine year lease. The railway company has acquired them in the com-

pany's character as a private business corporation incorporated under Japanese law. Such leases may be renewable for a longer period, but, in fact, they may or may not be exclusively subject to political administration by the railway authorities. For example, if the railway company possesses such leases at places remote from the railway, they cannot be interpreted as necessary for the operation of the railway system itself, and consequently are not legally subject to the political administration of the railway company.

The remaining two categories are governed not by the railway agreements at all but by Sino-Japanese treaty arrangements of 1903, 1905 and 1907 permitting the Japanese Government to establish so-called "exclusive settlements" in towns opened to foreign trade and residence by the Chinese Government. In such areas land may be acquired directly from private Chinese owners in the form of perpetual leases, and that is the very situation at Yingkow and Antung. As long as such perpetual lease lands are permitted under the treaties and international law they remain in the possession of the Japanese private owners without regard to the future of the railway lands, which, on the other hand, are subject to expiration and reversion to China in 2002.

2. Railway Lands Acquired by Japan from Russia. The first class of lands possessed by the South Manchuria Railway Company comprises those legally transferred from the Chinese Eastern Rail-

way by virtue of the treaty of Portsmouth and sanctioned by the Sino-Japanese treaty of Peking of December 22, 1905.[7] There has always been some confusion as to the exact size of the areas thus acquired by Japan. This is but natural in view of the controversies which arose immediately after the Russo-Japanese war as to whether certain areas, not only in the vicinity of Fushun and other collieries and mining regions, but at various points along the railway, were actually in the valid possession of the Chinese Eastern Railway Company before the treaty of Portsmouth. Again the question arose immediately as to whether the Japanese Government acquired possession of lands which were not originally obtained by the Chinese Eastern Railway strictly for the requirements of that railway as a communication enterprise. One Japanese authority gives the figure of 65 square miles as the total area of lands directly acquired by Japan from the former Russian possessors.[8]

The pre-war surveys of the right of way of the Chinese Eastern Railway were non-definitive; and, inasmuch as the Russians had acquired townsite areas, as often by foul means as fair, from the local Chinese owners, sometimes with inadequate compen-

[7] MacMurray, Vol. I, p. 523. Art. 6, Treaty of Portsmouth; *ibid.*, p. 550. Articles 1 and 2, Treaty of Peking.

[8] Asakawa, K. "Japan in Manchuria", *Yale Review*, Aug.-Nov., 1908. (See additional note in *Yale Review* for May, 1909, pp. 86-87.) Professor Asakawa described these figures as officially communicated to him by the South Manchuria Railway Company.

sation and often without any compensation at all, numerous cases arose immediately after the Portsmouth treaty of Chinese claiming ownership of lands nominally transferred from the Chinese Eastern Railway to Japan. There existed at the time no agreement limiting the total of lands which might be acquired for the use of the railway, and no such agreement has ever been negotiated subsequently between Japan and China.[9] The issue, raised, but never settled, before 1905 as to whether the Chinese Eastern Railway might acquire large tracts of land not necessary for the maintenance of an ordinary system of railway transport was left for controversy after the Japanese acquired the South Manchuria Railway.[10] Consequently, the controversies which arose after 1905 between China and Japan may better be treated after some preliminary attention has been given to the acquisition of lands by the Japanese military during and immediately after the war itself. Many of such areas have since been transferred to the South Manchuria Railway Company.

3. Railway Lands Acquired During and Shortly After the War. By far the largest part of the lands now possessed by the South Manchuria Railway was acquired by transfer from Russia in 1905. Such areas as have been acquired subsequently by vari-

[9] The Sino-Russian land expropriation agreements pertaining to the Chinese Eastern Railway were negotiated in and after 1907 and have no application to the South Manchuria Railway. (MacMurray, Vol. I. pp. 663, 667.)

[10] *Vide:* Asakawa, K. in *Yale Review,* August, 1908, p. 203.

ous methods comprise but a small part of the total. But, though small in area, their importance, judged by the controversies that have arisen over them with the Chinese authorities and government, is out of all proportion to their size. Since the most consequential of these controversies pertained to the case of the Fushun collieries, the most valuable single property of the South Manchuria Railway Company in Manchuria excepting only the railway itself, this problem of the progressive enlargement of the railway's lands takes on a not unimportant juristic significance.

Basically, it must be remembered, that the original 1896 contract agreement for the Chinese Eastern provided in Article 6 that lands belonging to private Chinese persons might be acquired by the company either by payment of a fair price to the local owners —in which case they became as much a part of the railway's lands as if originally turned over by the Chinese Government—or by payment of an annual rental to the local proprietors.[11] Such lands were to be exempt from all Chinese land taxes. Furthermore, the 1898 agreement for the construction of the southern section to Port Arthur provided that the company might mine such coal " as may be needed for the construction or operation of the railway ".[12] Japan after 1905 obtained the right to acquire new lands in accordance with these two agreements, and,

[11] MacMurray, Vol. I, p. 76.
[12] *Ibidem*, p. 155.

in so far as such lands were clearly necessary for the operation of the railway itself, these individual land transfer agreements with local Chinese owners did not require any further sanction or approval by the Chinese Government. The presumption that such transfers in given cases were not irregular in procedure, and that reasonable compensation was given, was, of course, an implied condition of their legality.

Before dealing with the fundamental question as to whether the original railway contract agreements justified the acquisition of large tracts of land admittedly not necessary for the operation of the railway as a commercial transport enterprise, another means of initial enlargement of these areas during and immediately after the Russo-Japanese war requires consideration. The war itself, by leading to military occupation of all the larger cities in South Manchuria by the Japanese military forces, introduced the new element of " lands for military use " which in some cases have since been turned over to the South Manchuria Railway Company, either for purposes of administration or for possession. At various cities and villages along the occupied southern section of the Chinese Eastern Railway the Japanese military authorities staked out areas designated as acquired " for military purposes ". Hundreds of Chinese residents in these places within the war zone were forced to evacuate before the advancing Japanese armies. Many had fled after the outbreak of the war to avoid being requisitioned into

service for the Russians. When these *évacués* returned after the armistice in 1905 many of them found their real property in effective possession by the Japanese military. This situation was particularly evident after 1907 when Russian and Japanese military evacuation was finally completed in accordance with the terms of the Portsmouth agreement.

When Japanese civil authority replaced the military, and civil administrative tribunals were established under Japanese consular authorities, many of the former Chinese possessors of land titles actually permitted their claims to default, rather than face litigation in Japanese courts, the very idea of complicated litigation being highly repugnant to the ordinary Chinese. Some, however, contested their titles with mixed results. The fact of occupation for three or four years by Japanese military or private persons was frequently sufficient to prevent a reopening of individual cases.

For want of adequate Chinese or Japanese records on these numerous cases it is quite impossible at this date to pass any fair judgment on the general legitimacy of these transfers. Evidence furnished the writer, from time to time, by several Chinese now living in Mukden or Harbin, points to the conclusion that in some cases the appropriation of lands, either for military purposes or otherwise, was entirely unreasonable and without compensation. In other cases, however, it appears that military neces-

sity did constitute entirely sufficient grounds for outright confiscation by the Japanese authorities, as evidenced in one or two cases which have come to my attention where the former owners were actually found guilty of enemy service during the war.[13] Most conspicuous of all such cases, though never dealt with *in extenso* in any of the Chinese or Japanese published materials, and entirely unnoticed by foreign writers on Manchuria, is the case of a small area of land which today is inside the International Commercial Area in Mukden and removed by some distance from the South Manchuria Railway municipal area there. This is the case of Shih Chien Fang—The "Ten Room House" case—the name today referring to a certain plot of land.[14]

[13] Cf. Takahashi, S. *International Law Applied to the Russo-Japanese War*, pp. 185 ff.

[14] *The "Ten Room House" Case—Shih Chien Fang, Mukden.* This case illustrates one mode of original acquisition of land which subsequently has been transferred to the South Manchuria Railway Company. It is, furthermore, perhaps the best illustration of the impossibility of presuming that all the areas possessed by the South Manchuria Railway Company are clearly defined and unconditionally under the company's administration. No better illustration can be found to show the perennial nature of the controversies that have arisen over the specific land cases in areas adjoining or near the railway.

Shih Chien Fang is the Chinese name for a plot of land situated in the International Commercial Area of Mukden lying to the northeast of the "attached lands" (*fu-shu-ti* or *fuzokuchi*) of the South Manchuria Railway. The avenue on which the Chinese trolley line enters the railway area is also given that name. Within this plot is a small section of land covering two municipal squares which, for over twenty years, has been the subject of controversy between China and Japan.

The diplomatic controversy over Shih Chien Fang originated in 1907 when the Japanese Ministry of War gave orders to its agents in

Naturally from this situation there existed for many years cases of questionable titles to real estate held by Japanese individuals or the railway itself. Transfers of titles by assignment to the railway com-

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Mukden to appropriate the area for military purposes. The area then covered about thirty acres. Immediately thereafter the local Chinese authorities protested to the Japanese consulate on the ground that this land was illegally appropriated. It was asserted that a part of it—about fourteen acres—was the property of one Li Shih-cheng, a Chinese who had acquired it by purchase in 1904. Mr. Li seems to have left for Harbin in 1905 during which time his property was occupied by the Japanese military. The issue continued to reappear until 1909 when on September 27 the Japanese consul-general and the Mukden commissioner for foreign affairs signed an agreement validating the Japanese right to acquire Shih Chien Fang in the form of a long-term lease. (Text of the agreement may be found in Chinese in the following work: *A Collection of Treaties, Regulations, etc.* [*Yüeh Chang Hui Yao*], 2 vols., June, 1927, Vol. I, pp. 184-187.)

While validating the right to acquire this plot of land the agreement of September 27, 1909, further provided that Japanese possession might take the form either of annual lease, automatically renewable, or a lease in perpetuity. Unless the Japanese accepted these options then it was permissible to lease portions of the plot to other foreign nationals or to Chinese. In future, if and when general municipal regulations were promulgated to apply to the entire International Commercial Area where all foreigners might reside, the special regulations for Shih Chien Fang were subject to revision to conform with the general regulations. Assignment of any part of it could be made by the Japanese possessor only with the consent of the commissioner of foreign affairs at Mukden.

The issue was not settled by the 1909 agreement because of the confused character of several titles involved. Whereupon the original Chinese claimant to the plots in question, Mr. Li, renewed his claim to ownership. This was in 1918 when diplomatic correspondence over the issue resulted. An additional basis for the Japanese claim was at this juncture injected into the controversy when the Japanese claimed that the military had acquired rightful ownership of it since the Chinese owner of the plots in question had been found guilty during

pany by private Japanese claimants led to numerous instances of concealed titles, titles not registered in the Foreign Intercourse Office at Mukden. It does not follow, however, that the South Manchuria Railway Company should be credited with having acquired the larger part of its post-war areas in this

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the war of enemy service for the Russians; that the owner thus convicted was not Mr. Li but one Chi Feng-tai.

In 1921, after additional Chinese protests, the Japanese military sent soldiers to stake out the boundaries of the land. Chinese protests brought to light a situation where it was evident that the Japanese consular authorities in Mukden were unable to exercise any restraining authority over the Japanese military. In the same year the land in question was transferred to a private Japanese subject, one Mr. Kodama. Some time before 1925 he seems to have transferred his title to the South Manchuria Railway Company.

These assignments to a private Japanese and then to the railway were subsequently protested by the local Chinese authorities at Mukden. In October of 1925 the railway company issued instructions for levelling the land. When the Chinese police sought to prevent the work a clash occurred with the Japanese railway police. At this juncture the *Manchuria Daily News* (Oct. 2, 1925) printed an account of the incident in which the tract in question was called "Land for Military Use". Noting that the work of levelling the plot was conducted on October 10, the Chinese national republican holiday, this paper remarked: "The Chinese side felt provoked at seeing their warning ignored on the Chinese jubilation day, and an official of the Foreign Intercourse Office was sent around to get the levelling work suspended on the tenth and eleventh. Mr. Inouye, district agent of the railway, expressed his regret that the discontinuation of the work could not be made as it was under presidential orders." The article added: "We understand that this tract of land has been purchased by the Railway Company from the War Office, Tokyo."

In May, 1929, the South Manchuria Railway Company began the construction of roads in Shih Chien Fang. The original Chinese claimant to the land denied that he had transferred his title to the South Manchuria Railway Company. A form of compromise then eventuated between the Japanese consul-general and the Chinese Foreign Intercourse Office at Mukden. It was agreed that the land in

manner. Entirely legitimate purchase of land from private Chinese owners, characterized by payment of fair prices, was perhaps the rule, a situation which was aided by the superior ability of the Japanese, particularly when assisted by government-aided loan societies, to offer higher prices than the Chinese.

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question was to be leased in perpetuity to the railway company in conformity with the land lease regulations of the International Commercial Area at Mukden. This, it may be noted in passing, was provided for in the original 1909 agreement pertaining to the entire area in question. These "General Regulations Governing the Opening of Mukden City as a Commercial Port", had been promulgated in 1921 by the Fêngtien provincial authorities. They provided, *inter alia*, that "all administrative rights within the territory of the International Commercial Area" should be exercised by the special municipal bureau, directly responsible to the civil governor of Fêngtien province; that (Art. 7) all foreigners possessing leases therein should pay the Chinese municipal taxes; that residents should subject themselves to the local Chinese police regulations (Art. 6); and that public utilities were entirely subject to administration (Art. 11) by the Chinese authorities.

In view of the fact that the International Commercial Area is, speaking generally, subject to police and administration by the Chinese authorities, the consequence of the 1929 agreement between the Japanese consul-general and the Foreign Intercourse Office at Mukden would be to bring all the areas at Shih Chien Fang under Chinese administration. When, however, the Chinese local authorities proceeded to erect "police boxes" at Shih Chien Fang, in the plots long subject to dispute with the Japanese, they were forcibly stopped by the Japanese police of the railway areas nearby. The issue remains unsettled.

Except for the translations from the 1909 agreement and from the municipal regulations governing the areas within the International Commercial Area of Mukden, promulgated only in Chinese in 1921, the writer cannot assume responsibility for the accuracy of details in the above account. The facts have been gathered from almost innumerable sources, principally from the files of the Chinese Foreign Intercourse Office in Mukden and supplemented with articles in the

The areas transferred to the Japanese Government in 1905 have been stated to be 65 square miles.[15] Official figures from the head office of the South Manchuria Railway Company, furnished the writer at Dairen in November, 1930, give 48,498 acres, or approximately 75 square miles, as the total of the railway's lands in South Manchuria in 1908. Previously, however, there has been no satisfactory statement of the total areas of the railway's lands for specific years since 1905. Such as are available are tabulated below for the years 1908 and 1920.[16]

Japanese newspaper published in Dairen. (*Vide: Manchuria Daily News,* Oct. 12, 1925; Dec. 17, 1927.)

The case has been discussed in detail, not as a commentary on the policy of either the Japanese or Chinese in Manchuria, but as an appropriate illustration of the difficult jurisdictional questions involved in connection with this study of the South Manchuria Railway areas. The known facts are such that I can pass no judgment on the validity of the land titles themselves.

[15] Asakawa, K. *Yale Review,* May, 1909, pp. 86-87. Referring to the lands belonging to the Chinese Eastern Railway Company around Harbin, which is stated to have been 32,397 acres or about 50 square miles, Professor Asakawa stated that: "If one adds 20 square miles to this last area, the sum will be equivalent to the total extent of the land belonging to the South Manchuria Railway, which is at present under Japan's control. The exact area is 70.54 square miles or 45,156 acres. Of this, about 7.5%, or 5.35 square miles (3,429 acres), have been acquired by Japan from Chinese land-owners during and after the recent war with Russia, the rest—about 65 square miles—having been handed over by Russia in accordance with the Treaty of Portsmouth."

[16] Figures for 1908 from: Asakawa, *op. cit.;* for 1920 from: Hoshino, T. *Economic History of Manchuria,* pp. 88-89. The latter is an official publication of the Bank of Chosen, 1920. Here are indications of confusion and discrepancies and the figures are significant for their non-inclusion of the large areas at Fushun and Anshan.

	1908	1920
	Acres	Acres
Kungchuling	1,630	....
Liaoyang	1.503	1,479
Mukden	1,490	1,491
Tiehling	1,372	1,531
Antung	1,243	1,224
Changchun	1,228	1,248
Tashihchiao	773	....
Changtu	851	....
Kaiyuan	....	1,499
Dairen	570	751
Port Arthur	43	....

Dairen and Port Arthur are, of course, inside the Kwantung leased territory and are not to be considered within the so-called "railway zone", although the railway company owns land there, as it does in Japan proper—at Tokyo, Osaka and Shimonoseki, for example—and in Shanghai. Conspicuous omissions from the above figures are those for Fushun, where large collieries are situated and are under the management of the railway company, Anshan, the seat of the important iron and steel works also under the company's control, and the ports of Yingkow and Antung. In these two places the South Manchuria Railway not only acquired land by one means or another in 1905 but has subsequently been assigned the title to land formerly held by private Japanese owners. Moreover, there are fully a dozen other towns along the South Manchuria Railway where lands were in 1908 held by the railway but which are not given in the above figures for 1908. In the nature of the case it would be quite

impossible to tabulate all such parcels of land controlled in one way or another by the railway company. In Mukden, for example, there are no less than six plots, three in the International Commercial Area, and three inside the Chinese walled city, which are either possessed by the railway company or by private Japanese subjects. It is quite impossible to describe their titles. This situation was possibly the reason why the Chinese National Government at Nanking during February of 1930 requested the Mukden Chinese authorities to investigate and report on the total of the land areas possessed by the South Manchuria Railway, especially at Fushun, Anshan, Mukden, Antung, Yingkow, Kaiyuan and Penhsihu.[17] A convenient, but not descriptive, summary is the railway company's own figures for 1930, placing the total areas at 108 square miles.[18]

4. Early Colliery Cases: Fushun, Yentai and Penhsihu. Perhaps of greatest importance during this period were the cases involving the titles to land and mines in the vicinity of Fushun, Yentai and Penhsihu, three areas of coal-bearing strata in the vicinity of Mukden. The Portsmouth treaty transferred to Japan those mining rights which in South

[17] The *Manchuria Daily News*, Feb. 17, 1930.

[18] Figure supplied by the Head Office, Dairen, Nov., 1930. (Cf. Kwantung Government figures for 1929, *viz.*: Total areas—280,099,085 square meters, or about 108 sq. miles; excluding lands in the leased territory. *The Kwantung Government: Its Functions and Works*, pp. 1-2; *Report of Progress in Manchuria;* 1907-1929, pp. 53-54; 92-93.)

Manchuria were possessed by the Chinese Eastern Railway. But controversies immediately arose as to the titles of certain of these coal areas, and, consequently, the geographical extent of Japan's valid titles. In 1907 the Board of Foreign Affairs at Mukden applied to the Japanese Government for the restoration of certain coal mines which at Fushun had been occupied by Japanese troops during the war. In April the Japanese Government replied that the Fushun mines were considered to have been acquired by virtue of the treaty of Portsmouth. The matter was not so simple, however, for the Chinese claimed that the mines in question had originally been granted to two Chinese merchants in 1902 in the form of a concession, but that the later acquisition by one of them, and his application for incorporation of a new company containing $60,000 (*Mex.*) in shares owned by the Russo-Chinese Bank, had not been approved when the Japanese troops occupied the mines during the war. It was evident, however, that these very mines had actually been occupied by the Russian armies on the outbreak of the war. Considering the irregular practices attending approval and registration of land titles in China at this time, the fact that the Russian bank which actually financed the Chinese Eastern Railway claimed an interest in those mines, and the added fact that they were occupied during the early part of the war by Russian troops, the Japanese claim in this particular case may have been defensible. This was but one

of the cases at Fushun, however, and it is not so easy to conclude that in the case of three additional mines, some five miles from Fushun, which were occupied by the Japanese troops during the war, the Japanese titles were beyond question.[19]

Protracted negotiations, caused by a wide diversity of the respective claims of Japan and China over these coal mines which are the most valuable in all China—the richest, perhaps, east of Suez—were conducted from 1907 to 1909. Finally, on September 5, 1909, the two signed an agreement by which it was rather tersely, and apparently conclusively, agreed that "the coal mines at Fushun and Yentai" were henceforth to be *worked* by the Japanese Government.[20] What seems so conclusive, however, to those who interpret history from published conventional agreements, soon proved in this case to be quite otherwise. The agreement failed to delimit the areas in controversy, and constant controversy over the Fushun issue actually produced strained relations between the two governments from that time until 1911, when the Chinese Revolution gave the Chinese

[19] It is not quite adequate, therefore, to state simply that "The rich Fushun mines had been considered by Russia as appertaining to her railway concession". (Clyde, P. H. *International Rivalries in Manchuria*, pp. 152-153.) Neither the Russian Government nor the Chinese Eastern Railway Company, nor the Russo-Chinese Bank claimed that these outlying coal mines had been acquired by Russia. A more detailed treatment of this subject may be found in: Hsü, Shu-hsi. *China and Her Political Entity*, pp. 308-311. (Cf. Lawton, *op. cit.*, Vol. II, pp. 1251-1253.)

[20] MacMurray, Vol. I, p. 790.

new political problems of more vital concern. When, finally, the Japanese consul-general at Mukden, Mr. C. Koike, succeeded in securing an agreement from Mr. Han Kuo-chün, Chinese commissioner for foreign affairs at Mukden, on the matter of the mining taxes to be paid, and the boundaries of the concessions, it was still necessary to pay the Chinese by way of " indemnity " a considerable sum of money to regularize the proceeding at Fushun.[21] The " indemnity " proved to be but a mild palliative, as in so many other cases in Manchurian politics during the period, and is quite naturally not mentioned in the text of the agreement of May 12, 1911, which determined the condition of operation of the Fushun mines in future by the Japanese.[22] Nor did the 1911 agreement end the controversy over land titles in the Fushun mining area claimed by Japan. However this may be, it is highly doubtful if this question can again be raised by the Chinese Government with any prospect of a favorable solution. The *de facto* situation has been acquiesced in for twenty years.[23]

[21] An interesting account of these proceedings, which seem never to have been considered by foreign observers of Manchurian affairs, may be found in the *Manchuria Daily News*, Nov. 28, 1910; April 18, 1911; and May 13, 1911.

[22] MacMurray, Vol. I, pp. 792-793.

[23] The judgments of two well-informed contemporary students of this early Fushun colliery question may be here noted, though in fairness it should be said that neither of them was particularly favorable to Japan's growing interests in Manchuria. The late Willard D. Straight, who had been American consul-general at Mukden during the early stages of this controversy, declared, after his

As for the coal mines at Yentai and Penhsihu, not far from Mukden and Fushun, these were evidently not transferred to Japan by the treaty of Portsmouth. They had never been either possessed or operated by the Chinese Eastern Railway Company, which made no claims to concessions there before the Russo-Japanese war. Apparently private Russian subjects had held valid titles there, but not the Chinese Eastern Railway. The Penhsihu colliery question, however, was settled in 1910 by an agreement of May 22—one which, however, was so unsatisfactory to the Chinese that they made repeated attempts to secure its revision.[24] The mines there have been operated since 1910 by a Sino-Japanese company, in which the Japanese share is the property of Okura and Company, the operators of the mines. The South Manchuria Railway, however, apparently possesses titles to various lands in the vicinity of the Penhsihu collieries, and has title to

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retirement from the service of his government in Manchuria, that the Japanese continued to operate the Fushun coal mines with questionable titles. (*Vide: China and the Far East,* pp. 143-144. Clark University Lectures, Worcester, Mass., 1909.) The late Mr. Bertram Lennox-Simpson (Putnam Weale), who at that time was one of the best informed and competent writers on Manchurian politics, expressed the view that the Chinese concessionnaires or owners of at least two of the coal mines at Fushun were dispossessed of their titles illegally. (*The Coming Struggle in Eastern Asia,* p. 320.)

[24] MacMurray, Vol. I, p. 793, gives the text of the agreement. Some account of these efforts of the Chinese to secure revision of the Penhsihu colliery agreement may be found in the *Manchuria Daily News,* June 3, 1910; Dec. 29, 1910.

the mines at Yentai which are operated by the railway company, and which are connected with the main line by a branch railway. The Penhsihu collieries are now operated by the Sino-Japanese company formed in 1916, but this agreement terminates in 1940, whereupon the Chinese Government are entitled to recover the mines upon the voluntary liquidation of the company.

CHAPTER VI

Legal Bases for Enlargement of the Railway Areas

In the previous chapter the inadequacies of facile replies to the question "What is the South Manchuria Railway Zone?" was described. The term "railway zone" was criticized as having no legal justification and as one conducive to creating an entirely erroneous conception of the lands either attached to or administered by the South Manchuria Railway Company. The impossibility of drawing any accurate analogy between the railway areas themselves and "concessions" and "settlements" elsewhere in China was suggested by reference to the divergent situations at Mukden, Yingkow and Antung.[1] Finally, it has been shown that the lands either possessed or administered by the South Manchuria Railway Company in South Manchuria are not uniform, but include areas which derive their legal character from no less than six different types of land titles, determined by the mode of acquisition.

A distinction has been drawn in previous chapters between the "attached lands" or the "lands for the use of the railway" and the municipal areas, both of which are in practice under the company's

[1] A detailed treatment of Japanese jurisdiction at these places follows in Chapter VII.

administration. The reason for this distinction, and, in particular, the important question as to the legal justification for enlargement of the railway areas far beyond the obvious commercial needs of the railway itself, will now be considered. An ancillary question—the inclusion of the Antung-Mukden railway branch into the South Manchuria system—will also require subsequent attention.

1. The Question of the Railway Municipalities. The original intent of the 1896 railway contract agreement for the Chinese Eastern main line was obviously that only such lands as were " actually necessary for the construction, operation, and protection of the line " and such lands " in the vicinity of the line necessary for the procuring of sand, stone, lime, etc." were to become portions of the railway areas.[2] In this the agreement was explicit, and there were no additional provisions therein, or in the agreement of 1898 for the construction of the southern branch which, even by inference, may be taken as legal justification for the acquisition of large areas of land by the railway for the purpose of establishing municipalities.

We have seen, however, that previous to the Russo-Japanese war, the Russians, who controlled the Chinese Eastern Railway, not only acquired with Chinese consent large areas, as at Harbin, but went to the extent of establishing practically exclu-

[2] MacMurray, Vol. I, p. 76. Art. 6 of the Sino-Russian railway contract agreement for the construction of the C. E. R., Sept. 8, 1896.

sive municipal governments within them. Although the Chinese Government did contest the right of the railway authorities to exercise jurisdiction in these municipal areas, especially after 1907, it does not appear that the enlargements of the railway areas, which actually were the territorial bases for the establishment of municipal administration, were in themselves questioned by the Chinese Government. At Harbin, for example, as we have seen, the local Chinese officials actually connived with the Russian railway engineer-in-chief in obtaining such lands for the railway. Once the Chinese Eastern Railway Company had acquired title to such lands, through purchase or otherwise, they became the property of the company for the period of the railway concession. Whatever the intent of the original 1896 railway agreement, Chinese acquiescence in the continued possession of those municipal areas by the company operated to strengthen the Russian claim that a former *de facto* situation had become entirely legalized.

In so far as the railway lands in Kirin and Heilungkiang provinces were concerned, moreover, the Chinese Government by specific agreement sanctioned the continued possession by the railway company of those lands. Two agreements of August 30, 1907, one for each province mentioned, were negotiated and signed by Major General Horvath, the Russian general manager of the railway company, and by the acting *taotai* of each province, whereby

China recognized that such lands as had been acquired before that time by the Chinese Eastern Railway in these two provinces were valid acquisitions.[3] The Heilungkiang agreement stated that " the whole quantity of land required for the railway has been included in this agreement ", a total stated to be 126,000 Chinese *shang,* or approximately 345 square miles. No exceptions were made for the municipal areas therein included as at Tsitsihar Station or Hailar. The Kirin agreement was similar, the total area of the lands of the railway in that province being fixed at 55,000 *shang,* or approximately 150 square miles.[4]

These land expropriation agreements, it will be seen, have no direct bearing upon the section of the railway which eventually became the South Manchuria Railway. The latter lies almost entirely in Fêngtien, now Liaoning, province for which no such agreement has ever been made, either by the Russians or Japanese with the Chinese officials. Municipal areas, as at Mukden, had already been established by the Russians before the Russo-Japanese war, and it does not appear that the Chinese Government at the Peking negotiations in December of 1905

[3] MacMurray, Vol. I, pp. 663-671.

[4] A schedule of area of lands at fixed stations along the line was attached to each agreement showing the following sanctioned enlargements, among others: Manchouli, 5,000 *shang;* Chalainor, 6,000; Hailar, 6,500; Tsitsihar Station, 6,500; Anta Station, 6,000; Imienpo, 5,600; Pogranitchnaya Station, 5,000 *shang.* The area at Zaton Station, Harbin, was designated as 6,800 *shang.*

contested the possession of such municipal land areas by the Russians, nor the transfer of those specific areas, along with the lands obviously required for the operation of the railway, to Japan. The Chinese Government did contest, however, the Japanese claim to acquisition of several of the coal mining areas at Fushun and other places.[5]

With respect to these coal mines at Fushun and Yentai, however, in spite of the original questions of titles in numerous instances, it must be noted that a final disposition of the question was made when the two governments signed the agreement of September 4, 1909, which certified the right of the Japanese to continue in possession.[6] Here, again, the original intent of the 1896 and 1898 agreements was clearly altered by subsequent practice, acquiesced in by China, and, in fact, expressed in formal convention. It is very doubtful if the Russians at the outset had had any intention, in negotiating the early railway agreements, of exploiting coal mines on a large scale for export purposes. But in this 1909 agreement the Chinese Government, by agreeing to accept a royalty or tax upon tonnage production of the mines, and more especially by agreeing to an export tariff stipulation, actually, by clear implication, sanctioned the continued operation of the Fushun and Yentai coal mines by the Japanese as commer-

[5] See previous chapter.

[6] MacMurray, Vol. I, p. 790. Subsequent questions arose, however, over the exact limits of these mining areas, but China's explicit approval of Japanese right to possess and operate these mines is contained in the 1909 agreement.

cial enterprises without regard to the specific needs of the railway itself. Here, then, is perhaps the most striking illustration of Chinese official agreement to justify the exercise of rights not previously clearly possessed by the Russians. The jurisdictional implications are obvious, for especially at Fushun, there is today a considerable area within which the South Manchuria Railway has established municipal administration.

When once the Japanese had acquired from the Chinese Government explicit sanction for the transfer of the previous Russian holdings in South Manchuria to Japan it was entirely reasonable that they should have drawn upon precedents under the Russian administration to justify their acquisition of municipal areas in South Manchuria. Although the scope and character of the Russian rights to jurisdiction in such municipal areas had been contested by the Chinese Government, the actual possession of those areas had not. Japan, therefore, had valid precedent for the establishment of some form of municipal administration in areas, the acquisition of which had never been officially questioned by the Chinese Government. Just as the Russians had done, the Japanese pointed to the first section of Article 6 of the 1896 contract agreement which provided that " the lands actually necessary for the construction, operation, and protection of the line " might be acquired, either from the Chinese authorities, or directly from the private owners on payment of a single sum or on condition of annual rent pay-

ment.[7] The establishment of municipal areas, besides having the Russian precedent, soon secured the tacit sanction of the Chinese authorities, so much so, in fact, that it is extremely doubtful if the practice of the last quarter century could be reversed on legal grounds.

Care should be taken, however, to define terminology such as " tacit sanction ", " accepted in practice " or " usage ". There is a danger that such terms may be resorted to in order to justify a preconceived notion as to what, as a matter of policy ought to be the interpretation of questions which, in fact, can derive their legal character only from purely legal methods of interpretation. In other words, one may cite the reasoning of Dr. Nagao, formerly a councilor of the South Manchuria Railway, who, in seeking to prove that the South Manchuria Railway is a "colonial railway ", set out obviously to find some blanket justification—in law, if possible, and if not, well, what of it?—for the exclusive exercise of administrative authority by the company and other Japanese functionaries over the railway areas.[8] Dr. Nagao, who preferred not " to higgle about legal technicalities ", when confronted with the existence of lands actually possessed by the railway in South Manchuria, in some cases remote from the railway right of way itself, and in numerous cases obviously not required for the operation of the line itself as a communication system, seized

[7] MacMurray, Vol. I, p. 76.

[8] Nagao, S. *Study of Colonial Railways*, pp. 164 ff.

upon the expression " tacit consent " of China as an all-inclusive source of Japan's jurisdictional rights over all areas possessed, and of whatever character. He was quite right in his criticism of Dr. Ninagawa and Dr. Imai who, as a matter of fact, did fail to account for the municipal or commercial-residence quarters in the railway towns.[9] But, in trying to find justification for what he called Japan's " policy to contribute to the world economy ", he obviously departed from all legal method and found in " tacit consent " an expression sufficient in his view to give the color of legal sanction to all manner of assumed administrative functions on the part of the Japanese.

[9] " We cannot understand how Dr. Ninagawa and Dr. Imai, apparently oblivious of the fact that the land which is confined to what is intended for these two objects, should quote clause 2 of Article 6 abovementioned as the origin of the right concerning the railway area which includes the land intended for other than these two objects, that is, what seems to be directly intended for the development of Japan's policy to contribute to the world economy, *viz.*, the Company's land along the railway, for instance, such purely commercial quarters as are at Mukden, Changchun, etc." (Nagao, *op. cit.*, pp. 164 ff.)

Dr. Nagao contends that the source of Japan's administrative authority in the South Manchuria Railway areas is to be sought not alone in the treaties, but in " tacit consent ": " Since the provisions of Article 6 above mentioned cannot apply to the Chinese Eastern Railway principally intended for commercial and industrial purposes, the scope of the right concerning the same land must be defined according to the usage, that is, China's acquiescence in the acts of the Chinese Eastern Railway either actually executed or intended to be executed on that land. In other words, the origin of the right handed over by Russia to Japan concerning the South Manchuria Railway area should not be sought in any existing texts to be treated deductively, but the same subject must be evolved inductively from the unwritten law, and from a broader viewpoint." (Nagao, *op. cit.*, pp. 164 ff.)

By " tacit sanction ", in the sense in which it is used by the present writer, the term is meant to imply this: that, not by oversight, but by specific action, such as signing an agreement which carries the implication of approving the continuation of a *de facto* situation, or by conducting official functions in such a way as to take for granted that a hitherto *de facto* situation is operative and beyond alteration, the authorities of one country, without explicit recognition, of a *de facto* situation in a clause of any treaty, actually do give implied consent or sanction to what would otherwise be entirely unilateral. To illustrate: Have the Chinese Government or their local authorities in Manchuria questioned, by attempts to collect taxes levied upon Chinese residing in the railway areas, the right of the Japanese railway administration to exclusive tax powers therein? If so, the attempt constitutes, in the absence of specific sanction elsewhere of the Japanese right to tax Chinese, a non-acceptance of the blanket claim of the Japanese authorities. Have the Chinese Government or their local authorities, on the other hand, ever entered into local agreements, such as official requests for permission for Chinese troops to cross the South Manchuria Railway lands, recognizing that Japan has authority to exclude Chinese troops from those areas? If so, unless there is an accompanying reservation of right, the very act of requesting such permission constitutes a tacit sanction of the right of the Japanese to continue to police the railway. Again,

have the Chinese Government or local authorities by implication admitted the continued exercise of administrative powers by the Japanese in such specific municipal areas as Mukden? If, in promulgating regulations for the International Commercial Area at Mukden, these regulations specifically or by implication refer to the adjoining "attached lands" of the South Manchuria Railway as excluded from those regulations, is it not reasonable to conclude that such reference operates as a tacit sanction to the continued exercise of those rights on the part of the Japanese?

In other words, not silence, not oversight, but actual testamentary evidence is the most reliable source for what may be termed legal rights obtained or strengthened by tacit sanction, usage or implied from the practice. These must be tangible and clear and deducible from specific situations. Moreover, it is reasonable to add that they must not be exceptional, but of a nature to show that situations, hitherto merely *de facto,* have become the accepted rule operative for a considerable period of years. Whether, aside from practical considerations of diplomacy, it may be possible after the passing of a quarter century or more to raise the original legal validity of the exercise of administrative authority, in view of the acceptance in practice of such authority for so long a period, is a question which cannot readily be answered. A strong presumption that specific practices are justifiable in law is derivable

from the number and character of the documentary evidences which show by implication, that specific situations were recognized as operative.

In the absence, then, of specific conventional agreements to sanction the acquisition of lands for municipal areas, and in the absence of a body of agreements or other testimonial evidence in official documents sanctioning the same by implication or tacit acceptance, it would have been necessary for the Japanese, after Portsmouth, to rely on the wording of the original 1896 and 1898 railway agreements. At the very outset, however, the war itself brought on new situations, caused by military occupation and consequent military requisitions which continued down until the evacuation of the Japanese troops in 1907. The Chinese Government appear to have made no formal protest against the acquisition of the municipal areas, as at Mukden, by the Japanese Government. The result was, as has been described in detail elsewhere in this study that, all along the railway newly acquired in South Manchuria, the Japanese obtained not only the old Russian municipal areas but obtained unnecessarily large tracts of land which could not possibly be regarded as necessary for the maintenance of the railway as a mere system of communication.[10] There

[10] It is instructive to recall at this date a frank admission of this fact by Professor K. Asakawa of Yale University in an article written in 1908: "As these lands were to be acquired, according to the original stipulation, strictly for railway purposes, one would wonder what justification Russia had—and Japan as well in following her extraordinary procedure—in acquiring unnecessarily large tracts

existed no agreement with China restricting the amount of land that might be thus acquired, and none has since been negotiated. The railway agreements themselves authorized the railway company to acquire lands for the use of the railway itself, and as that original provision had never been clearly defined by agreement between Russia and China, the result was that the newly created South Manchuria Railway Company came to be recognized, much as the Chinese Eastern Railway Company had been, as a pseudo-private commercial company, which, in fact, was but the residuary legatee of political rights obtained by the Japanese Government in South Manchuria. By "recognized" it is to be understood that the Chinese authorities in Manchuria made no effort to declare that it was illegal to transfer lands to the railway company for use as municipal areas. At a very early date the Mukden provincial authorities did seek to prohibit, by mandate and numerous published regulations concerning the transfer of pri-

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of land, and in building cities within them. Of the latter action, the offence seems twofold at any place which is not open to foreign trade, for not only does it exceed the agreement, but it trespasses against the provision that no private foreigner except the missionary may reside in China outside of the treaty ports. As for the unduly large size of the railway lands, it is to be noted that Baron Komura made a brief reference to it at the conference, but M. Witte made no reply on the point, and the former pushed it no further. Indeed, as we have said, Japan has even improved upon the Russian method along her railways, though all the lands acquired about her stations probably do not exceed the area under Russian administration round about the one city of Harbin". (Asakawa, K. "Japan in Manchuria". *Yale Review*, Aug., 1908, p. 203.)

vate Chinese titles to the Japanese, the increase in the size of these municipal areas. But the official action of the Chinese Government never went so far as to declare the transfers of individual areas to the railway company *ipso facto* illegal as contrary to Chinese constitutional law. The distinction is important, for there is a fundamental difference between what the Chinese sought to do as a matter of policy, and what they actually did in law.

After 1915 the legal right of the Japanese, either the railway company or private Japanese individuals, was strengthened by the Sino-Japanese exchange of notes of May 25, 1915, which textually authorized the Japanese to obtain land in South Manchuria and Eastern Inner Mongolia in the form of " long-term leases ", defined therein as " leases for a long term up to thirty years and unconditionally renewable ".[11] The article is so worded that it refers not only to land " in the interior ", meaning outside treaty ports, but anywhere in South Manchuria. Moreover, if a strict legal interpretation of it be made, it is evident that it constitutes more than a recognition *in principle,* as has sometimes erroneously been stated. It is quite true, also, that since 1915 the Mukden provincial government, and the local authorities in Kirin province, have repeatedly issued instructions to local officials prohibiting them from conniving at or taking cognizance of land

[11] *The Sino-Japanese Negotiations of 1915.* Carnegie Endowment for International Peace, 1921, pp. 45 and 55.

transfers by private Chinese owners to the South Manchuria Railway Company or to private Japanese. It is equally true, however, that local Chinese officials have continued to permit such transfers, that there are numerous instances, early and recent, of specific land titles possessed by the Japanese which are secured by signed deeds, even to " ownership in freehold "—some of these even outside of treaty ports—and many of them registered and on file in the local Chinese district magistrates *yamên*. Some of these titles are traceable back to private Russian possessors before 1905, including, for example, cases at Liaoyang before that port was opened to trade. Others before 1912 exhibit transfers connived at by Chinese officials in violation of the Manchu dynastic " Law Prohibiting Bannermen to Transfer Land " or the " Manchu Imperial Household Laws ".

2. The Procedure in Acquiring Land Transfers in South Manchuria. A description of the actual procedure in practice today in South Manchuria in connection with the transfer of private-owned Chinese lands to the railway company will illustrate the degree of Chinese acquiescence in the enlarging of the municipal areas of the South Manchuria Railway. The first fact to notice is that the local Chinese officials continue to take cognizance officially of such transactions by the magistrates' affixing of seals upon the certificates of contract which accompany the registration of the title deeds. The Japanese contend, however, that as long as they possess the

title deed in any case that is the strongest evidence of the right of possession of the land, and that the certificate of contract is merely a Chinese official form for record purposes. They assert that, having obtained the title deed, the legality of a particular transfer in Japanese law depends upon its registration at the appropriate Japanese consulate. They assert that the fact that a newly appointed and less amenable Chinese district magistrate might destroy the certificate of contract previously filed in the *yamên* cannot be taken as invalidating the title deed once the latter has come into Japanese hands. Even when there is no registration of such land transfers at all, in the opinion of local Japanese officials with whom the writer has discussed this matter, the possession of the deed itself is sufficient evidence of legal possession of the land in question. Otherwise there would be a patent case of denial of justice whenever some local magistrate should choose to write off land transfers, made in pursuance of monetary payments to private Chinese, by observing the orders from Mukden or Kirin City, orders which are intended, in the Japanese view, to prevent the transfer of land to the Japanese as a matter of policy.

A striking fact appears in one class of such cases as have come to the writer's attention. Actual transfer of title to *ownership* appears in some of these title deeds. The question may well be asked by virtue of what international agreement the actual pur-

chase in freehold of land in the interior of China is permitted by Japanese or any other foreigners, not missionaries. The fact remains, however, that there are numerous such deeds in Manchuria in the possession of the Japanese. It may be remarked, incidentally, that the Chinese land laws and their administration in Manchuria seem to have resulted in prohibiting all foreigners *except Japanese* from obtaining land in freehold—a situation which any Chinese official in Mukden or Harbin will admit to be contrary to the general intent of both Chinese law and policy. Were the number, location, and extent of all such plots of land held *in freehold,* according to the title deeds, by Japanese in both North and South Manchuria known, it is more than probable that both the Mukden and Nanking authorities would themselves be very much surprised.

But whether these title deeds provide for transfer of ownership or grant long-term leases to the Japanese who possess them, the procedure is practically the same and may be described briefly as follows: When a private Japanese or the South Manchuria Railway Company desires to obtain possession of a piece of land in South Manchuria, and such transfer is favored by a private Chinese owner, a title deed is drawn. This is accompanied by a certificate of contract which is actually in two parts, or, otherwise understood, is in duplicate. The title deed is taken to the *yamên* of the local Chinese district magistrate who places his " chop " or seal, in the

customary half-and-half manner upon the two certificates of contract, one-half of the seal impression being placed by a single stamping process upon each of the two certificates. If formal registration of the land transfer is approved, the title deed is a " red deed ". If not, it is a " white deed ". But, in the Japanese view, whether " red " or " white " the title deed itself, in possession of a Japanese and registered at a Japanese consulate, is more important as evidence of legal possession than the matter of registration in the local magistrate's *yamên*. This is the procedure in cases of transfer of ownership.

Another mode of acquiring title to land in South Manchuria, which is the basis for numerous instances of acquisition of real property by the Japanese from private Chinese owners, is through mortgage. Here both parties to the transaction appear at the local magistrate's office to obtain official confirmation either in the form of a " red " or " white " certificate. The Japanese assert that, in this case, the " red " document carries stronger presumption of validity under Chinese law, although the difference between the two is very much confused by variations in local usage. The mortgage usually results from prior financial indebtedness of private Chinese land owners to individual Japanese or to the railway company. It may be recoverable, therefore, unless displaced by subsequent transfer of title to the Japanese.

In the case of leases, the period may be thirty years, with the presumption of renewal by mutual consent. The South Manchuria Railway Company, on the other hand, may acquire land leases for the full remainder of the unexpired ninety-nine years of the railway concession period, i. e., until 2002. When such plots of real property are located inside treaty ports where it is permissible for foreigners to obtain leases in perpetuity, the titles read accordingly, and would terminate irrespective of the future of the South Manchuria Railway itself.

Finally, the view of officials in the Land Office of the South Manchuria Railway Company is that the expression " may, by negotiation ", contained in the Chinese text of the Sino-Japanese treaty and notes of May, 1915, pertaining to leasing of land by Japanese in South Manchuria, is to be interpreted as meaning simply " negotiation by the parties to each agreement " and that, of course, these negotiations should be entirely without accompanying duress—duress which would naturally invalidate any such contract. These Japanese officials interpret the instructions of the Mukden authorities to local Chinese officials, referring to this procedure of transferring land to Japanese, as constituting in themselves a recognition of the 1915 agreement, however much they seek to circumvent their application in practice. They hold, further, that the actions of the local Mukden government cannot be interpreted as sufficient to deny or to invalidate the Sino-Japanese

treaty and notes of 1915 which specifically sanctioned the lease of land by Japanese in South Manchuria. Obstructions to the procedure, and orders prohibiting the transfer of land to the Japanese, therefore, are interpreted as in violation of the international agreement of 1915.

3. Illustrations of Acquiescence in Japanese Possession of Municipal Areas. An attempt will now be made to summarize a series of separate instances in which the Chinese Government, the provincial authorities at Mukden or Kirin, and the local district magistrates in South Manchuria have taken action, in one form or another, which may be considered evidence of official acquiescence in the continued possession in practice by the South Manchuria Railway Company of municipal areas along the railway. These instances are cited as illustrative data, not as a complete statement of such instances. To give such a full statement would require more space than the subject justifies, and would, in any event, be beyond the competence of the writer.

(1) In the first place, it is appropriate to repeat that numerous plots of real estate have been transferred by Chinese private owners, either by granting a title to ownership, by transferring a lease, or by mortgage to the South Manchuria Railway. Normally, these transfers are, as a matter of fact, recorded in the Chinese district magistrate's office concerned, and bear his seal. They are invariably registered in the appropriate Japanese consulate.

(2) With respect to the municipal area of the railway company at Mukden, for example, it may be remarked, first, that the Chinese general regulations for the administration, of the International Commercial Area, which adjoins the Japanese " railway settlement ", explicitly refer to the " attached lands " of the railway in Mukden,[12] and by describing the boundaries of the commercial area clearly exclude the entire Japanese municipal area. Official Chinese maps designate the Japanese railway municipal area in Mukden by the Chinese characters " *fu-shu-ti* ", or " attached lands " of the South Manchuria Railway, and designate an adjoining area, to the south and east, as " *man-tieh yung-tsu-ti* ", translated as " South Manchuria Railway permanent lease lands ".

(3) After the sale of the Hsinmintun-Mukden railway section to the Chinese Government following the Russo-Japanese war, the Chinese railway administration of the Peking-Mukden line, of which this first-named section was a part, sought to obtain permission from the South Manchuria Railway Company to allow the extension of this Chinese railway across the " railway settlement " of the South Manchuria line toward the native Chinese city. Japan had permitted previously the establishment of the station terminal of the Peking-Mukden Railway within the South Manchuria Railway area at Muk-

[12] The Chinese expression is " Man-tieh fu-shu-ti " or " Man-tieh yung-tsu-ti ".

den. Aside from the policy factors involved (and the incident was a cause of great annoyance to the Chinese who had to transport cargo in carts from their railway station two miles to the Chinese city) it actually resulted in an agreement whereby the Chinese Government specifically conceded the right of Japan, in the name of the South Manchuria Railway Company, to retain a large tract of land (said to be 30,000 *tsubo*) adjoining their railway station in Mukden. In the negotiations over this issue which continued from 1909 to 1911, the Chinese, by requesting a dispensation to permit the extension of the Peking-Mukden railway into the Chinese city, went on record as acquiescing in the possession of the railway municipality areas by the South Manchuria Railway Company.[13] The Sino-Japanese agreement of September 2, 1911, specifically refers to the "South Manchuria Railway Company's area" at Mukden, acknowledging Japanese authority to assume unqualified control over railway matters there.[14]

(4) In Liaoning and Kirin provincial regulations concerning the levying and collection of land taxes, there is a specific category relating to land taxes

[13] *Vide:* MacMurray, Vol. I, p. 795. Agreement by which China received the right to extend the Peking-Mukden Railway into Mukden, Sept. 2, 1911. (Cf. Harrison, *op. cit.*, p. 540; Asakawa, *Yale Review*, Nov. 1908, pp. 279-280; *Manchuria Daily News*, Dec. 20, 1910; July 6, 1911.)

[14] MacMurray, Vol. I, p. 795. No attempt has been made here to discuss phases of this Mukden station question not germane to the legal issue above described.

leviable upon Japanese possessors of real property. This constitutes official cognizance of the legal possession of such lands by Japanese. Where such lands are possessed by the South Manchuria Railway Company in the municipal areas the company has consistently refused to pay taxes other than those provided for in the original land transfer agreements, which provided for a single payment at the time of the transfer of the property or for annual payment in consequence of possession of the lease.[15]

(5) All along the South Manchuria Railway lines at the various railway municipalities under the control of the railway company a system of mutual rendition or extradition of Chinese and Japanese accused of crime has been established—irregularly, to be sure, without a formal treaty basis, and frequently ignored in practice. The South Manchuria Railway Company uses a special written form which is frequently followed in cases where Chinese police officials, acting under the authority of the district magistrate concerned, seek and obtain permission to make arrests in the Japanese-controlled areas. Generally, of course, the Japanese do not permit any such authority of Chinese police on their railway lands, but the exceptions give evidence of instances in which the local Chinese officials, in spite of the absence of any general extradition or rendition

[15] The special subject of the right of taxation in the railway areas is discussed in detail in Chapter VIII.

agreement between China and Japan, do acquiesce in the police jurisdiction of the Japanese over the railway municipalities by requesting its waiver in special instances.[16]

(6) Numerous instances are on record, including a request of the Chinese military authorities to transport troops over the South Manchuria Railway through Changchun in the summer of 1929, during the conflict with Soviet Russia over the Chinese Eastern Railway, wherein the Chinese authorities have requested permission from the Kwantung Government and the South Manchuria Railway to transport troops over the Japanese-controlled railway, or have requested permission to allow Chinese troops to cross the Railway's right of way or the railway municipalities. The South Manchuria Railway Company has a special form for such requests and has kept a record of these cases as contributory evidence that the Chinese Government have in practice acquiesced in the exercise of some jurisdiction by Japan over the railway and its municipal areas.

(7) Regarding the situation at Yingkow, the terminus of the branch line of the South Manchuria Railway from Tashihchiao, there is one circum-

[16] A case in point is a request of the Mukden District (Shenyang) Police authorities, dated the 15th year of the Republic, 3rd month, 29th day (March 29, 1927), to the Japanese consulate-general at Mukden, asking permission for Chinese police to make an arrest of three Chinese who resided within the South Manchuria Railway municipal area, but who were accused of having committed a crime outside that area in territory under Chinese jurisdiction.

stance which, as early as 1906, effectively closed the issue as to the land titles obtained there by Japanese during the period of military occupation. In the formal rendition agreement of December 5, 1906, there is a clause as follows: "No suits at law decided during the military occupation shall be reopened by the Chinese local authorities."[17] This branch railway was not recognized by China as a part of the South Manchuria Railway system until September 4, 1909,[18] but, once that concession was given to Japan the avenue for questioning the original land titles later transferred to the railway company remained closed, as of December 5, 1906.

4. Inclusion of the Antung-Mukden Railway Areas. Before 1909 the South Manchuria Railway system did not legally include either the short branch line between Tashihchiao and Yingkow, or the long branch, nearly 200 miles, which has come to be known as the Antung-Mukden line. Today both of these lines are, for purposes of commercial operation, integral parts of the South Manchuria Railway system. Only such historical facts as are germane to this study which here seeks to inquire into the legal validity of the inclusion of so-called "railway municipalities" along the Antung-Mukden line under the administration of the South Manchuria Railway Company, will be considered.[19] During the Russo-

[17] MacMurray, Vol. I, p. 613.

[18] *Ibidem*, Vol. I, p. 790.

[19] A brief statement of the international negotiations concerning the inclusion of the Antung-Mukden line into the South Manchuria

Japanese war a light military line of narrow gauge was built by the Japanese military from Antung to Mukden. In the Sino-Japanese agreement, attached to the treaty of Peking of December 22, 1905, this railway was conceded to remain under Japanese control, the same to be converted into a commercial line.[20] This right, however, was to terminate in fifteen years " from the date of the completion of the improvements " required. These were to be concluded within two years, exclusive of a year-period required for evacuating the Japanese troops, i. e., on December 22, 1908.[21]

The actual reconstruction of the line, however, was delayed by the Japanese for various reasons, the principal of which was their insistence that the Antung-Mukden line should be included in the South Manchuria " railway zone ". China, on the other hand, contributed to the initial delay by refusing to concede to the Japanese the right to police the line with Japanese " railway guards ".[22] Other minor

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Railway system may be found in the author's documentary study: *The International Relations of Manchuria,* pp. 72-73.

[20] MacMurray, Vol. I, p. 551.

[21] *Ibid.* " Under the terms of the Treaty, Japan forfeited all right to reconstruction on December 22nd, 1908." (Harrison, *op. cit.,* p. 285.) The clause specifically limiting this period for " improvement " of the line was contemporaneously omitted by the Japanese press in editorially seeking to place the onus for delay upon China. (Cf. Harrison, *op. cit.,* pp. 285 ff.)

[22] Japanese official *communiqué,* Aug. 7, 1909. (Harrison, *op. cit.,* pp. 530-532.) China's statement to the powers, published in the *National Review,* also is given in Harrison. During April, 1909, the Chinese Government demanded the withdrawal of Japanese troops

questions impeded the negotiations, such as China's claim that the conversion of the military railway to one fit for commercial traffic did not justify an entirely new route, or the expropriation of large areas which would be required for a broad gauge line. The three-year period within which Japan was to improve the line and convert it into a commercial route expired on December 22, 1908, and technically Japan's right to implement the original agreement of 1905 terminated on that date.

On August 6, 1909, however, after the matter had been allowed to remain *in statu quo* for some months, the Japanese Government sent an ultimatum to China demanding a resumption of negotiations to implement the original provision of 1905 so as to enable the Japanese Government to reconstruct the line. An official *communiqué* of the following day set forth the Japanese case.[28] The Chinese grounds for insistence that Japanese troops be withdrawn were declared to be " frivolous and inconsequential " and of a nature to justify Japan to take " independent action ". Jointly conducted surveys had been practically completed in April of 1909, and the Chinese objections to the presence of Japanese troops as

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from the Antung-Mukden railway as a condition of resumption of negotiations for the improvement of the line. (*North China Herald,* April 10, 1909.) The Japanese consul-general at Mukden refused on the ground that the line ought to be considered a part of the South Manchuria Railway and hence might be patrolled by " railway guards ".

[28] Printed *in toto* in Harrison, *op. cit.,* pp. 530 ff.

" railway guards " were declared to be but a phase of her policy of " obstruction and procrastination ". This question as to " railway guards " was declared by the Japanese Government to be a " collateral question " not appropriate to the negotiations. Japan consequently abruptly refused to consider the question, raised by China on June 24, 1909, " regarding the police authority in the railway zones and the withdrawal of railway guards ".[24]

The point which should concern us here is that the Chinese Government definitely raised the question of railway guards in connection with the Antung-Mukden railway line, but that the Japanese Government refused to discuss it. The outcome was, in consequence, that China, faced with the ultimatum of August 6, was constrained to accede to the Japanese demands.

The official Chinese *communiqué* to the powers in explanation of their stand on this matter set forth the following justification of their action: At the date of expiration of the time limit for completing the improvements necessary to convert the line to a commercial railway, i. e., on December 22, 1908, the Japanese Government " gave no indication of any intention to resume negotiations in the matter ". China, however, yielded to a later Japanese request to open the issue, but the Japanese consul-general at Mukden " further delayed matters by refusing China's request that Japan should not place mili-

[24] Harrison, *op. cit.*, p. 531.

tary guards either on or adjacent to the line, but should leave the policing of the railway zone to China ". This brought on the Japanese ultimatum of August 6. China replied at once that " as the improvements were being made in the interests of trade and commerce no necessity existed for the extension of the railway zone, but China would not raise any objection if Japan wished to change the gauge and effect other improvements of an engineering character ". This reply also stated that " no extension of military control of patrolling of railways in Manchuria would be permitted and that the Chinese Government would furnish police for guarding the line ".[25] The *communiqué* continued: " We are sure that under the pretext of development of communications and commerce the Japanese Government desires to build this railway almost entirely for military purposes." A particularly significant statement, pertinent to our study, follows:[26]

[25] Harrison, *op. cit.*, pp. 533 ff. gives the full text.

[26] *Ibid.* Dr. P. H. Clyde has published an interpretation of this dispute over the matter of policing the Antung-Mukden railway which takes very little account of the subject of police and railway guards at all. Dr. Clyde declares: " Her [China's] only ground for protesting further action on the Antung-Mukden Line by the Japanese lay in establishing her interpretation of the time limit clause as the correct one." Dr. Clyde admits that technically the time limit expired on Dec. 22, 1908. When, therefore, he asserts that China " chose rather to cloud the issue with questions which had no legal justification in the controversy " he evidently presumes that it is appropriate to overlook the fundamental question of the right to station railway guards and police this line. As it is entirely beyond the purpose of this study to seek to defend a particular national policy in the very controversial issue itself, it is only necessary to assert emphatically

"In view of the situation set up by the matters treated of in the foregoing, and particularly regarding the extension of Japanese military control in Manchuria, we have been compelled to lay particular emphasis on the question of military protection of the railway and the construction of the police force. If Japan had conceded these points this matter would have been settled long ago, and she would have been under no necessity to attempt to lay the blame for any delay at the door of China."

This Chinese *communiqué* to the powers characterized the action of Japan as obviously the result of being able to rely "upon her superior strength", a situation which compelled China to accept the Japanese conditions for reconstructing the Antung-Mukden line.

The resulting formal agreement of August 19, 1909, merely contained China's approval that the Antung-Mukden railway should be reconstructed by Japan in accordance with preliminary surveys.[27] Special regulations were drawn and signed concerning the manner of purchasing land necessary for the improvement of the line.[28] The formal agreement made no mention of the relation of the Antung-Mukden line to the South Manchuria Railway Company,

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that these factual data are included in the present study to permit of a fair interpretation by impartial students. Dr. Clyde has omitted reference to the Chinese official *communiqué* to the powers explaining their position, and has overlooked Mr. E. J. Harrison's criticism of the unethical omission made by the *Japan Times* in quoting the terms of the agreement of December 22, 1905. (Cf. Clyde, P. H. *International Rivalries in Manchuria*, pp. 148 ff.)

[27] MacMurray, Vol. I, pp. 787-788.

[28] *Ibidem*, pp. 788-789.

but by consenting to the assumption by the South Manchuria Railway Company of authority to negotiate with local Chinese officials and land-owners for necessary lands along the Antung-Mukden line, a provision explicit in the special regulations for land acquisition, the Chinese Government inferentially sanctioned the subsequent management of the Antung-Mukden line by the South Manchuria Railway Company. These regulations were in themselves sufficiently detailed to enable the Japanese authorities to acquire clear title deeds to all lands along the railway required for the reconstruction of the line. Each land transfer required official registry and approval by the Chinese Government. Consequently, for the railway lands along the Antung-Mukden route, it is evident today that the limits of Japanese jurisdiction are more clearly defined than along the main line of the South Manchuria Railway. The Antung-Mukden line today is, for purposes of commercial administration, an integral part of the South Manchuria Railway system, although, under the terms of the 1915 treaty and notes, Japan's period of possession is somewhat longer, i. e., to 2007.[29]

[29] *Ibid.*, Vol. II, pp. 1220, 1222. China did not explicitly admit, therefore, the Japanese claim to the right to station railway guards along this railway. It is equally evident, however, that the Chinese Government did not include in the formal agreement any explicit reservation of the right to raise the question subsequently. The preliminary negotiations, however, did contain such a reservation on the part of China, as shown above. This point has been noted by one author, very familiar with the entire negotiations: "The matter of railway guards and policing the zones was left in abeyance. At the

In conclusion, it may be said that the legal basis for the exercise by Japan of administrative authority over the railway municipalities along the Antung-Mukden line is quite distinct from that for the main line of the South Manchuria Railway or the branch line to Yingkow. The original 1896 and 1898 railway contract agreements for the construction of the Chinese Eastern have no direct application to the Antung-Mukden line at all, as the latter line was

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same time, China took pains to make it clear that she did not admit the claims of Japan to exercise administrative and judicial functions in the territory adjacent to the line." (Lawton, *op. cit.*, Vol. II, p. 1242.) China did make subsequent efforts to police the Antung-Mukden line, but without success. Mr. Lawton's prediction has proved quite correct. "The Japanese settlements along the line will grow in size and importance, administrative rights will be exercised, and the South Manchurian garrison increased under the pretext of the need for railway guards."

Mr. Lawton, who travelled over the line before its reconstruction, had ample evidence for his assertion that to make the line usable for commercial purposes it would have to have been converted to a broad gauge and straightened to eliminate the tortuous detours of the military line. Mr. Lawton pointedly remarked that "the issue solely depends upon the question as to whether or not the line can be regarded as a branch of the South Manchuria Railway". The point was not raised in the negotiations of 1905, nor the matter of railway guards and police. "It cannot be denied", he wrote, "that China was within her right in seeking an early solution of the question of railway guards and policing. . . . . That no settlement has yet been reached is alone due to the procrastination of Japan." China, according to Mr. Lawton, had no right, once having reopened the question, to seek to prevent the necessary conversion of the gauge and to insist on no alterations in the original route. It will be remembered that the Chinese Government later departed from this untenable position. China's claim should have been confined to insistence on her administrative rights in the areas traversed by the Antung-Mukden line. (Lawton, *op. cit.*, Vol. II, pp. 1242-1244.)

never in the possession of the Russians.[30] The opinion may, therefore, be ventured that, from a strictly legal point of view, the Chinese Government are entitled, unencumbered by formal commitment to the contrary, to raise the question whenever the opportunity again presents itself.

[30] Dr. S. Nagao, in his book on the South Manchuria Railway as a "colonial railway", in an endeavor to show that the Antung-Mukden railway is subject to the application of the 1896 and 1898 contract agreements for the Chinese Eastern, declares that in the Sino-Japanese additional agreement attached to the treaty of Peking, December 22, 1905, Article 6 provided that "all matters concerning the Antung-Mukden line" shall be conducted "practically in accordance with the Chinese Eastern Railway agreements". The only possible basis for this misquotation is the following in that agreement: "The Chinese Government will also appoint a Commissioner to look after the business relating to the railway as is provided in the Agreement relating to the Eastern Chinese Railway." (MacMurray, Vol. I, p. 552). This clause has nothing to do with the political administration of the Antung-Mukden line, and, further, does not even mention the South Manchuria Railway Company. Dr. Nagao's assertion, then, that "since the nature of matters concerning the same railway is not defined, it may be interpreted as meaning that, concerning the establishment of the railway areas along the line [of the Antung-Mukden] and also the administrative affairs therein, the Chinese Eastern Railway agreement shall be followed". (Nagao, S. *Study of Colonial Railways*, pp. 164 ff.) His presumption is an obvious attempt to find legal sanction where none exists. The clause referred to, as the context clearly indicates, was to describe the functions of a Chinese Commissioner who was to participate in supervising the construction work.

CHAPTER VII

Japanese Jurisdiction in South Manchuria Treaty Ports: Mukden, Yingkow, and Antung.

When one considers carefully the legal character and the manner of exercise of Japanese jurisdictional rights in the " treaty ports " along the South Manchuria Railway, two factors reveal themselves in sharp silhouette against the general situation which prevails in the ordinary " railway towns " which have never been opened to foreign trade, either in pursuance of a treaty or by independent action of China. In " treaty ports "—notably at Mukden, Yingkow and Antung—there are clearly two distinct sources in the treaties for exercise of jurisdiction by the Japanese: the one comprises the railway agreements themselves; the other, the body of treaty rights, available under most-favored-nation treatment, so far as commercial privileges are concerned, by all treaty nationals, which permit the Japanese to obtain land in perpetual lease in these designated cities. Japanese consular jurisdiction, therefore, operates to create special jurisdictional rights in these perpetual lease areas.

A distinction should be drawn, therefore, between cities along the South Manchuria Railway not opened to foreign residence and trade by any action of China and the so-called " treaty ports "—which

latter may be not ports at all but situated in the interior, as at Mukden and Changchun. Only those treaty ports which are traversed by the South Manchuria Railway concern us here, for it is the exercise of Japanese jurisdiction through or in coöperation with the railway company in these places which reveals an element invariably overlooked by students of the subject. Eight cities or towns in South Manchuria have been designated by China, in treaties signed with Japan or other foreign countries, as to be opened for foreign residence and trade. At only two of these places (Mukden and Changchun) are there so-called International Commercial Areas (*shang-fu-ti*), areas set aside by the Chinese Government where foreigners of all nationalities may reside, carry on trade, and (if subjects of states having appropriate treaties with China) obtain land in perpetual lease.[1] Here the locally-termed "Japanese railway settlements" adjoin the International

[1] The eight cities or towns designated as places to be opened for international residence and trade in South Manchuria are: Mukden and Antung (American and Japanese treaties of Oct. 8, 1903); Yingkow (opened by implication from the careless designation of "Newchwang", which in reality is several miles up the Liao from Yingkow, treaty of Tientsin, 1858, actually opened in 1865); and additionally, Changchun, Liaoyang, Tiehling, Tangkangtzu and Fenghuangcheng (Sino-Japanese treaty and additional agreement of Peking, December 22, 1905). Changchun is the northern terminus of the South Manchuria Railway; the next three named are on the main line between Mukden and Dairen; while Fenghuangcheng is on the Antung-Mukden line, a branch of the main S. M. R. line. Other towns or cities opened to foreign trade in South Manchuria, but not on the railway system, such as Kirin and Lungchingtsun, are omitted here.

Commercial Areas and are independently administered.[2] The treaties permit of the establishment of "international settlements" or "commercial areas" at Yingkow and Antung as well, but none has ever been established there, independent of the Japanese railway areas or special settlements.[3] The result is that foreigners (non-Japanese) frequently reside in the Japanese-administered special municipal areas in Mukden, Changchun, Antung and Yingkow, and, by so doing, create complicated problems of jurisdiction involving their respective extraterritorial rights. Large numbers of Chinese, too, reside in each of these places, within the Japanese-con-

[2] There is an International Commercial Area at Changchun, therefore, but it is unimportant from an international point of view as few foreigners, other than Japanese and Russians reside there, and the former are concentrated in the Japanese railway area adjoining it. There is no American or British consulate at Changchun.

[3] Professor M. Royama, in his article on "The South Manchuria Railway Zone" (*Pacific Affairs,* Nov., 1930) does not discuss the peculiar relation of the South Manchuria Railway to the so-called Japanese "railway settlements" at Mukden, Yingkow and Antung. Professor Hsü, in his subsequent article on "The Status of the Railway Settlements in South Manchuria" (*Chinese Social and Political Science Review,* April, 1931), merely remarks: "It may be pointed out that parts of the Railway Settlements in Yingkow and Antung were originally granted by China as Japanese settlements in those ports. To simplify matters, perhaps we should omit them from the present discussion." (p. 31.) This article was written as a criticism of Professor Royama's article noted above, and, therefore, required no particular attention to the status of Yingkow, Antung and Mukden. In a comprehensive study of the actual administrative rôle of the South Manchuria Railway Company, however, the fact that the company has become the governmental agent for municipal administration in these latter areas, where peculiar and mixed juristic rights prevail, requires that detailed attention be given these situations.

trolled municipal areas, raising frequently the question of the scope and character of Japanese legal rights over them.

1. *Japanese Jurisdiction at Mukden.* The largest single municipal administrative area controlled by the Japanese along the South Manchuria Railway is at Mukden, the political capital of the three Manchurian provinces and Jehol. This area of 2,365 acres, or something less than four square miles, is about nine-tenths of the entire land holdings of the South Manchuria Railway Company in Mukden, the remaining tenth being included in the lands " used by the railway ".[4] This Japanese-administered municipal area is locally called the " Japanese settlement " or " railway settlement ", but it should be distinguished from settlements elsewhere in China because the entire administration of the area is under the South Manchuria Railway Company, and is neither international, nor representative of the private Japanese citizenry who reside there. For all purposes of municipal administration, except police and court trial, the railway area is under the control of the South Manchuria Railway Company. Police functions are under the direction of the Kwantung Government of the leased territory, while judicial matters are performed under the authority of Japanese consular jurisdiction as established by the general China treaties. How this situation came about

[4] Figures from the Japanese. *Local Administration Statistical Annual;* 1930, pp. 74-77. (S. M. R. Co. publication, Dairen.)

cannot be understood without recalling a few essential facts with regard to the opening of the city of Mukden to international trade and residence, or without viewing the Japanese-controlled railway municipal area against the other two local administrative units at Mukden: the native Chinese municipality, and the International Commercial Area.

Mukden was opened to international residence and trade in pursuance of two treaties: the American and the Japanese commercial treaties with China, dated October 8, 1903.[5] The Russo-Japanese war, however, prevented the actual opening of the city and the demarcation of a specific area for international settlement within which foreigners might acquire property in the form of perpetual lease lands. Mukden was not actually opened to foreign residence and trade until 1907, and, it was not until two years after that that a compromise agreement between China and the foreign states concerned provided for the establishment of a separate international commercial area there.[6] This delay was due especially to a difference of opinion between the Chinese Government and the governments of foreign states, including Japan and the United States, over an issue which arose concurrently elsewhere in China, and which has not been definitively settled to this day. China contended that the duty-free area of a so-called " treaty port " was restricted to a

[5] MacMurray, Vol. I, pp. 430, 414.
[6] *U. S. For. Rels.*, 1907, Pt. I, p. 221.

specific area sharply delimited by Chinese authority, and did not include the entire city or "port" named. The foreign view, including that of Japan and the United States, has generally been in unanimous opposition, the contention being that as Mr. Willard D. Straight, the American consul-general, insisted to the Tartar-General at Mukden in 1907, the duty-free area included the whole city in addition to the delimited foreign settlement.[7]

Two important phases of this controversy have had permanent effects on the legal status of Japan with respect not only to Mukden but to the situation which prevails at all open ports in Manchuria. One obvious and declared reason for the Chinese insistence that the duty-free area of an open port be restricted to the designated section called the "foreign settlement" or "commercial area" (*shang-fu-ti*) was the desire of the Chinese Government to collect a transit tax, i. e., *likin,* on all goods, whether of foreign or Chinese origin, which entered the native Chinese city. During 1906 and the years which followed, the local "consumption tax" was nothing but *likin* under another name. While generally American merchants after 1907 paid the "consumption tax" or *likin* at Mukden and elsewhere in Manchuria, with the occasional protest of the American State Department, but usually with its tacit acceptance of the Chinese policy, the Japanese Government refused consistently from the beginning to per-

[7] *Ibidem,* pp. 221 ff.

mit their merchants to pay these taxes, in whatever guise, on foreign goods moving into the Chinese city, beyond the demarcated International Commercial Area.[8] This issue between the Chinese and Japanese governments has frequently arisen since that period, especially during 1925 to 1929 without definitive settlement.[9]

But there is still another phase of this question which raises the presumption that the Japanese Government have been consistent as to their definition of the duty-free area in a treaty port in order to establish a clearer legal claim to land titles possessed by private Japanese nationals outside the railway area and outside the International Commercial Area at Mukden, that is, within the native Chinese city itself. There are at least four such plots of real estate possessed by Japanese, two in the inner walled city, and two outside the walled city but within the native Chinese city of Mukden.[10]

While the interpretation of the treaty rights by foreign states, including the United States, has never been such as to support a Japanese contention to exercise any form of jurisdiction beyond that clearly derivable from consular jurisdiction over

[8] *U. S. For. Rels.*, 1907, Pt. I, pp. 221-231.

[9] *Manchuria Daily News*, Aug. 30, 1927. Recounts Japanese opposition to the action of the Chinese police of the International Commercial Area in seeking to compel Japanese residing within the Chinese city to remove to the commercial area or to the Japanese-administered railway municipality.

[10] These plots are shown on both Chinese and Japanese maps of Mukden.

Japanese nationals residing either in the International Commercial Area or within the native Chinese city of Mukden, foreign states have generally not contested the Japanese insistence that their nationals are entitled under the treaties to reside, not only in the commercial area, but also in the native Chinese city. This has not been the attitude of the Chinese Government, however, and the issue at Mukden remains today much as it was in 1907.[11] The

[11] Some historical data on the Mukden situation since 1906 will serve to illustrate the difference of opinion between the Chinese and foreign governments on this question. On December 11, 1906, Minister Rockhill instructed the American consul-general, Mr. Willard D. Straight, at Mukden that: "It would be better to accept the view of Mr. Hagewara and those of the British and German consuls, and have indiscriminate residence throughout the city, than accept a strict delimitation of territory to form an international settlement coupled with the restrictions the Chinese seek to impose on commercial rights." (*U. S. For. Rels.*, 1907, Pt. I, p. 228). Mr. Straight, therefore, urged upon the Tartar General that the "commercial area" should be considered the whole of the treaty port of Mukden.

Prince Ch'ing of the Wai Wu Pu in Peking, however, protested to Minister Rockhill on Jan. 30, 1907, that the treaty of 1903 specified that suitable sites should be selected within the treaty port for international residence and that that could not mean the whole city. (*Ibid.*, Pt. I, pp. 221-222.) To this Minister Rockhill replied: "Residential and trading rights are insured to Americans within the whole of the cities and suburbs of Mukden and Antung, and special settlements to facilitate the same, but nowise intended to curtail such rights, are set aside thereat." But Minister Rockhill added that, in spite of the right explicit in the treaty of 1903, the United States was willing to waive the privilege of residence anywhere within the city of Mukden in order to meet the Chinese wishes. This was not to be interpreted, however, as conceding the Chinese contention that transit taxes or "consumption taxes" might be collected on goods outside of the International Commercial Area. (*Ibid.*, Pt. I, pp. 222-223.) During January and February of 1907, the United States con-

Chinese see in the Japanese contention a possible development which might result from the progressive absorption by Japanese nationals, or the South Manchuria Railway, of lands outside the Japanese railway area at Mukden, but within the municipal

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sequently protested the attempts of the Chinese to levy such taxes at Mukden. (*Ibid.*, Pt. I, p. 231.)

A year later the Chinese Government asserted that: "In none of the treaties has it been clearly expressed how the limits of a 'treaty port' and the 'interior' must be defined. . . . . Up to now the foreign ministers in Peking held the opinion that the words *'t'ung shang k'ou an'* [treaty port] comprised the port, the city of the port, and any road or waterway connecting these two. To this defining of the limits we have never agreed." (*Vide:* Tyau, *Legal Obligations*, etc. p. 96.) The foreign view in reply showed complete disagreement. "In the absence of an explicit definition acceptable to both sides, the intention of the treaties must be examined, and it will doubtless be conceded that the imposition of import duties on foreign merchandise was intended to admit those goods to particular markets in China, and that it was not intended that these goods should pay other dues until transferred to more distant markets in the interior. . . . . That the foreign powers, in negotiating the treaties, intended that a fairly liberal area should be comprised by the term 'treaty port' or 'port open to foreign trade' is evidenced by the use of the terms 'cities and towns' in the English text of the British treaties, and *'ports et villes'* of the French treaties; also by the rules regarding the issue of passports for travelling in the interior, where no passport is called for within 100 *li* (33 miles) of the treaty port." (*U. S. For. Rels.*, 1908, pp. 143-145.)

In view of the marked difference of interpretation of the treaties it would be hazardous to attempt any final judgment on the limits of the Chinese rights to tax foreign goods in or in the approaches to a "treaty port". It would seem, however, that the Chinese contention that foreigners are not entitled to reside in the treaty ports outside the designated "settlements" or "commercial areas" is reasonable. Else why designate these areas at all? This, however, has not been the view of the American and Japanese governments, as evidenced, for example, in the Wuhu case in 1908. (*U. S. For. Rels.*, 1908, p. 123 ff.)

limits of the treaty port. The policy of the Japanese Government in supporting the claims of Japanese nationals to real property in the International Commercial Areas (as in the *Shih Chien Fang* case, discussed elsewhere), and to do this by actually contesting the right of the Chinese to establish police control over those plots, has naturally gone far to justify the Chinese attitude. Recent acquisition by the South Manchuria Railway Company of additional plots of land adjoining the railway municipal area has added to this feeling of the Chinese, and has counselled them to incorporate all land surrounding the railway municipality into a single-unit administrative area, under the authority of the native Chinese municipality.

The administration of the International Commercial Area at Mukden, which lies generally between the Japanese railway municipality and the native Chinese city, is practically in Chinese hands, though the local consular corps may be consulted on several matters. General regulations governing the opening of Mukden as a trading port and providing the basis for acquisition of land in perpetuity by foreigners within the commercial area were promulgated in April of 1921.[12] These contain thirteen articles;

[12] *Kung Pao* (*Government Gazette*), Mukden, April 11, 1921. But no official translation of these regulations has been made by the Chinese authorities. Consequently, there is much confusion over the true import of several articles. The only translation of these regulations available in Mukden in 1930 was a British version, which, because of alleged requirements of secrecy, could not be divulged. References made to the text herein are, therefore, from a private translation made from the original Chinese.

while supplementary "building regulations" contain forty-eight. In so far as these regulations may be interpreted as not contrary to treaty rights of foreign nationals they may be considered the organic law for the International Commercial Area at Mukden. These regulations provide for a demarcation (Art. 2) of the commercial area, within which foreigners may reside and obtain leases of land, the Japanese railway area adjoining being referred to as the "attached lands" of the South Manchuria Railway Company. The entire area is subject to municipal administration by the Chinese for all purposes of police, taxation and control of public utilities (Articles 4-7, and 11). Article 4 provided that "all administrative rights within the territory of the International Commercial Area shall be vested in the Chinese Bureau of the Commercial Area [*Shang Fu Chu*]," which was originally directly responsible, not to the adjoining Chinese municipality, but to the civil governor of Fêngtien, now Liaoning, province.[13] But where cases arise between Chinese and foreigners they are justiciable (Art. 6) according to procedure derivable from the treaties with foreign states, that is, in accordance with the respective consular jurisdiction of the nationals concerned.

In practice, this International Commercial Area is subject to Chinese municipal administration, in-

[13] In 1928 the International Commercial Area was made directly subordinate to the municipal government of the Chinese native city. This municipal system for the Chinese city had been inaugurated in 1923.

cluding police, and there are no foreign police within it. Taxes are levied and collected by the Chinese authorities under an agreement with the local consuls. Irrespective of the historical claims of the Japanese Government, therefore, with respect to jurisdictional rights within this area, notably at Shih Chien Fang, it would seem that the entire area should be considered subject to the complete and unimpaired application of the general regulations detailed above. There is, consequently, no legal justification for the existence of any other police force in the International Commercial Area except one instituted by the Chinese themselves.

The status of the Japanese-administered railway area at Mukden is superficially clear, but actually involved. The area itself is under the general control, for all purposes of municipal government, except police and judicial proceedings, of the South Manchuria Railway Company. This administrative authority has been conferred on the railway company by the Japanese Government not only over the railway's lands but over such lands as have been incorporated into the "railway administrative area" for purposes of municipal administration, and also over those which were originally held in title by private Japanese subjects. The character of the land titles which the Japanese hold at Mukden, within the areas under the administration of the railway, is confusing in the extreme. It appears that this area includes the following types of land:

such lands as were originally obtained by transfer from the Chinese Eastern Railway; certain lands confiscated by the Japanese military between 1904 and 1907, and subsequently turned over to the railway company, the exact nature of the titles being unknown publicly; certain plots originally obtained by private Japanese subjects, and thus held in title to this day or transferred to the railway company; and, finally, lands acquired by the railway company itself, since the Russo-Japanese war. This latter category includes various types of title, for Mukden is an open port, and land can be acquired, therefore, in perpetual lease, while the railway company, under Japanese treaty rights pertaining to acquisition of land by the railway itself may obtain additional land "for the use of the railway". Such lands, therefore, may become lands leased for the remaining portion of the ninety-nine year lease-period of the railway concession. But the railway company, as a foreign incorporated, private business enterprise, may also acquire short-term leases, such as for thirty years, and include these in practice—though with a doubtful legal right—within the areas under the practically exclusive administrative control of the South Manchuria Railway Company. This is, with some qualifications, a picture of the situation at Yingkow and Antung as well.

2. Japanese Jurisdiction at Yingkow. At Yingkow, situated on the Liao river and connected by a branch railway line with Tashihchiao, on the main

line of the South Manchuria Railway, a Japanese community had existed in a more or less distinct district under the military régime following Japanese occupation during the Russo-Japanese war. The branch railway between Yingkow and Tashihchiao had been constructed originally by the Russians, under terms of the 1898 contract agreement for the construction of the southern branch of the Chinese Eastern Railway. That agreement provided that, although the Russians might construct the branch to Yingkow, it was to serve solely to facilitate the transportation of materials for the construction of the Harbin-Port Arthur line, and upon the completion of that line, the short branch to Yingkow was to have been demolished whenever the Chinese Government so desired.[14] Following the war, Japan claimed title to the Yingkow branch line on the ground that it had been a part of the Chinese Eastern system in South Manchuria. The South Manchuria Railway Company, therefore, claimed title to the lands of that branch railway which lay to the north of the principal settlement area in Yingkow.[15] On December 6, 1906, Japanese military occupation of Yingkow ceased, and the Chinese flag was flown over the customs house for the first time

[14] MacMurray, Vol. I, p. 155, Article 3.

[15] It was not until 1909, however, that a Sino-Japanese agreement, dated Sept. 4, specifically recognized the Japanese claim that this Yingkow-Tashihchiao line was to be considered a branch of the South Manchuria Railway system. (MacMurray, Vol. I, p. 790.)

since 1900,[16] with the exception of a few hours after Russian evacuation during the war. The Japanese Government had, in fact, taken over complete control of the municipal administration of Yingkow during 1905.[17]

Thus, after the peace of Portsmouth had paved the way for resumption of Chinese jurisdiction over Yingkow, the withdrawal of Japanese troops left a situation which was not regularized by agreements between China and Japan. During their military occupation large tracts of land had been acquired by the Japanese, by what amounted to forced sale to the Japanese military.[18] The Japanese Government had made withdrawal of their troops from Yingkow conditional upon the acceptance by the Chinese of the Japanese requirement that the public works, begun by the military, should remain under

[16] *British Diplomatic and Consular Reports: Trade of Newchwang*, 1906, p. 15. "Newchwang" had been opened to international trade in pursuance of the treaties of 1858 and 1860. The original intent of the treaty was to open the city of Newchwang, which, in reality, is some fifteen miles up the Liao from Yingkow. But when it was discovered that Yingkow, at the mouth of the Liao, was more convenient for foreign trade, the British Government established their consulate at the latter place. The Chinese acquiesced in this unusual procedure and foreigners still confuse the two cities, as Yingkow is frequently called "Newchwang" incorrectly, even in British and American consular reports. Incidentally, if a letter is addressed from Shanghai to "Newchwang", it will go to Yingkow. If addressed from a point in Manchuria to "Newchwang" it will be delivered in Newchwang!

[17] Baron Komura to Minister Lloyd Griscom at Tokyo, May 25, 1905. (*U. S. For. Rels.*, 1905, pp. 616-617.)

[18] British and American consular reports, the latter for December, 1907.

Japanese control. Consequently, a tract of land between the eastern extremity of Yingkow and Niuchiatun, an area which comprised the Japanese community during the military occupation, was turned over by the Japanese Government to the newly organized South Manchuria Railway Company in 1906.[19] The properties belonging to the Russian-constructed railway line, lying some distance from the mouth of the Liao and the present Japanese "railway settlement", were taken over by the South Manchuria Railway as "lands for the use of the railway", and the district where the Japanese community existed was also turned over to the administration of the railway company. These latter lands were originally obtained in the form of perpetual leases by private Japanese nationals, and many of the plots in the area now controlled by the railway company for administrative purposes still are held in title by private persons.

Japan's right to establish a separate settlement in Yingkow and to turn this over to the South Manchuria Railway Company for purposes of administration was for a long time contested by the Chinese. Nor has it been entirely clarified today as to just what successive steps were taken to legalize the Japanese claims. The first public reference to the

[19] Lawton, *op. cit.*, Vol. II, p. 1285. "As very few Japanese resided outside this district, the change meant that as far as the treaty port of Niuchwang (Newchwang) was concerned they were privileged to live in territory over which their country, represented by the South Manchuria Railway Company, exercised territorial jurisdiction."

Japanese " settlement " at Yingkow is contained in the Sino-Japanese " additional agreement " attached to the treaty of Peking, December 22, 1905. But this provides merely that " the methods of laying out the Japanese Settlement at Yingkow in the province of Shengking, which has already been opened to trade, ... shall be separately arranged and determined by officials of Japan and China ".[20] The special agreement pertaining to Yingkow thus contemplated was actually signed on November 9, 1906, at Peking, in the form of a memorandum, under the signatures of the Japanese Minister and the Chinese Foreign Office.[21] It provided, *inter alia,* that all public works begun by the Japanese military were either to be completed by the Chinese local authorities or " the latter must allow the Japanese to complete them ". Japanese police inspectors were to be employed to assist the local authorities.

The formal agreement for the rendition of the port of Yingkow to China, signed on December 5, 1906, reaffirmed this memorandum but added that the Chinese authorities might modify the municipal regulations on their own responsibility after the military evacuation of Japan.[22] The Chinese Government agreed that the public works begun by the Japanese military administration should be operated in future by a certain joint stock company to which

[20] MacMurray, Vol. I, pp. 552-553.
[21] *Ibidem,* pp. 612 ff.
[22] *Ibidem,* p. 612.

the military had turned over these enterprises. Consequently, such municipal public utilities as the water works, an electric tramway and an electric light plant were conceded by the Chinese Government to this private company which, in fact, was Japanese-controlled. The agreement reaffirmed the provision of the original Peking memorandum of November 9 regarding the employment of Japanese police and medical instructors by the local Chinese authorities. Finally, an important article effectively closed the very controversial issue as to the validity of the Japanese land titles acquired during the period of military occupation by stating: " No suits at law decided during the military occupation shall be reopened by the Chinese local authorities." [23]

China had not yet conceded, however, that the branch railway from Tashihchiao to Yingkow, originally built by the Russians solely for the purpose of facilitating the transport of construction materials to the Harbin-Port Arthur line, should be considered a part of the South Manchuria Railway system. To do this would be tantamount to sanctioning the extension of the railway company's administrative jurisdiction over the newly created Japanese " settlement " in Yingkow. China was eventually constrained, however, to make the concession, and the issue was closed by the Sino-Japanese agreement " concerning mines and railways " of Sep-

[23] *Ibidem*, p. 613.

tember 4, 1909.[24] China further agreed to the extension of the line into the newly formed Japanese "railway settlement". The result is that, in addition to the "lands for the use of the railway" lying some distance away, the South Manchuria Railway today exercises municipal administration over the entire Japanese "settlement" at Yingkow.

It thus appears that the Japanese right to establish a separate national "settlement" at Yingkow is actually explicit in the agreements with China. In any case, the opening of the port to international trade in 1864, in pursuance of the treaties of 1858 and 1860, had given sanction for the acquisition of lands in perpetual lease by foreigners. China's consent to the inclusion of the Yingkow branch line within the South Manchuria Railway system operated to sanction the continued possession of the "lands for the use of the railway" which lay to the north and east of the Japanese "settlement". These adjoin the section called Niuchiatun, which, in turn, adjoins the present Japanese "settlement", the latter being by far the largest area possessed by the Japanese in Yingkow. Still farther below on the Liao river lies the main city of Yingkow, the Chinese city, within which practically all the nation-

[24] Article 2. "The Government of China recognizes that the railway between Tashihchiao and Yingkow is a branch line of the South Manchuria Railway, and it is agreed that the said branch line shall be delivered up to China simultaneously with the South Manchuria Railway upon the expiration of the term of concession for that main line. The Chinese Government further agrees to the extension of the said branch line to the port of Yingkow." (MacMurray, Vol. I, p. 790.)

als of other foreign states have their business offices, " go-downs " and residences.

During a visit to Yingkow in November of 1930, the writer was able to obtain considerable data on the subject of Japanese jurisdiction there, particularly in connection with land titles. Especially since 1923 the local Chinese land owners have been reluctant to grant further leases of land in perpetuity to Japanese for inclusion within the area under the administration of the South Manchuria Railway Company. Deeds transferring from one Chinese to another plots which adjoin this area frequently contain clauses prohibiting their subsequent transfer to Japanese. There appear to be few, if any, cases of outright sale of land to Japanese. The Japanese titles, as those of other foreigners, are in the form of perpetual leases, a distinction which is important if, in future, the political status of these areas alters. It will come as a surprise to many that there is technically a " British concession " at Yingkow—a tiny area of land below the Japanese " settlement ".* But, as there are perhaps not more than a dozen British firms in the port, and no attempt has been made to establish a " government " over these few plots in the " British concession ", this anomalous curiosity may be overlooked. There is no international commercial area at Yingkow such as that at Mukden.

* *Vide: China,* No. 1, 1899, pp. 314, 352. A part of the original British concession was washed away by the eroding waters of the Liao river before 1899.

3. Japanese Jurisdiction at Antung. The status of Japanese jurisdictional rights at Antung is not unlike that at Yingkow. The Japanese "railway settlement" here is much larger, however, and the site for commercial purposes is far superior.[25] A plot of land was once specified by the Chinese Government to be used as an international settlement but the port has been dominated so much in recent years by Japanese trading interests that few foreigners reside there, and the development of a separate international settlement administration has not seemed necessary.[26] Antung is situated on the Yalu river, across the Korean port of New Wiju, about twenty to twenty-five miles from Tatungkow, a much smaller town at the mouth of the river. Antung was designated in the American treaty, and Tatungkow in the Japanese treaty, of October 8, 1903, as ports to be opened to foreign residence and trade by China.

A Japanese community sprang up at Antung during the Russo-Japanese war, so that by 1907 the Japanese population of the port numbered about 6000. The Japanese "settlement" was at that time about a square mile in area, and had been established on the best commercial site along the Yalu river, lying below the native Chinese city and the plot

[25] Japanese-administered areas at Antung comprise over four million square meters, or about one thousand acres. About half of this accounts for the municipal area, the remaining portion being included in "lands for the use of the railway".

[26] There is today no American consul at either Newchwang, i. e., Yingkow, or Antung, the consular office at the latter place having been withdrawn about 1926.

designated by China for the creation of the international settlement.[27] During the period before 1908 foreign consuls reported to their home governments that the Japanese were acquiring large plots of land to be added to their "settlement" by practically compelling transfer from the local Chinese owners.[28]

Antung was actually opened to international trade and residence in 1907 when the maritime customs house was opened. The rapid increase in the Japanese population of the port was due principally to the fact that Antung is the only port of outlet lying on the Gulf of Pechihli which serves the hinterland drained by the Yalu and the Hun rivers—an area rich, on the Manchurian side, with timber and cereal produce. As Antung is the southern terminus of the

[27] *British Diplomatic and Consular Reports: Trade of Antung,* 1907. Annual Series, No. 3993, p. 3.

[28] The late Willard D. Straight, American consul-general at Mukden in 1907, subsequently stated that Japanese "seized large tracts of land at Antung and Kuangchengtzu and other cities along the South Manchuria Railway, paying the owners thereof at a rate below the market price if at all". ("The Situation in Manchuria", published in *China and the Far East,* p. 143. Clark U. Lectures, 1910.)

Dr. Morrison, in a dispatch to the London *Times,* dated Peking, July 29, 1906, referring to the obstacles to the establishment of an office of the Chinese maritime customs at Antung, pointed out that it was difficult to obtain a convenient site since the Japanese had expropriated for a nominal payment during their military occupation the whole of the river frontage for several miles, and that there was little land outside the Chinese native city available for other foreigners or for the customs compound. Dr. Morrison stated that at the time the Japanese authorities were seeking to secure legalization of the transfers obtained by the military during the period of occupation. (Cf. Lawton, *op. cit.,* Vol. II, pp. 1163-64.)

branch line of the South Manchuria Railway which connects the Chosen Government Railways with Mukden it naturally came to be dominated commercially by the Japanese. The native Chinese city, however, is much larger than the Japanese " settlement ", and has been aided in its growth by the annual migration of Chinese laborers from Shantung across the gulf.

Exactly as at Yingkow, the Japanese Government turned over to the administration of the South Manchuria Railway Company the area which had been acquired as a Japanese " settlement ", but this did not occur until 1923. As at Yingkow, the lands today included within the so-called " railway settlement " are largely a heritage from the Russo-Japanese war. The Antung-Mukden railway was built during the war as a light military line to furnish the Japanese military with an approach from Korea. Military confiscation of land in Antung was the source of part of the Japanese " settlement " which sprang up during and after the war, but private acquisition of real estate by Japanese nationals in the form of perpetual leases was common. Just as at Yingkow, moreover, there was a multi-colored mixture of titles acquired by fair and foul means.[29] Frequently

[29] One interesting land case at Antung which has come to the attention of the writer, involves a contest between the Chinese local authorities and the South Manchuria Railway over a particular plot of land adjoining the Japanese "railway settlement". This is the "*Rainbow Bridge*" case. Three years after the railway company had taken over administrative control of the Japanese "settlement" at

the Japanese paid high prices for their leases, but there is considerable evidence that this was not the uniform practice at Antung. The Japanese "railway settlement" at Antung today is a well-defined

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Antung a dispute arose over the legitimacy of including within the administrative areas of the railway company the territory in the vicinity of Niji-bashi, or "Rainbow Bridge". The local Chinese merchants' guild contended that this territory had been recognized on both sides as outside the jurisdiction of the Japanese "settlement" authorities.

It appears that some time after 1908 the Chinese merchants' guild requested the Japanese authorities to assist in straightening a canal which drained the district on the borders of the Japanese settlement and the native Chinese city. The Japanese authorities seem to have undertaken this work on condition that the Chinese guild construct a bridge across the canal and keep it in repair. In 1926 the old bridge needed repair, and the South Manchuria Railway Company proceeded to construct a new bridge, the "Rainbow Bridge", at the same time taking the position that the district drained by the canal had become a part of the Japanese "settlement", due to the negligence of the Chinese.

An incident of more than local interest occurred when Chinese mass meetings, student demonstrations and violence were used to protest the Japanese action. The following quotation from the *Manchuria Daily News*, Dairen, May 21, 1926, serves to illustrate the intensity of feelings over the issue. "A mass meeting was held in front of the temple at the base of Yuan-pao Hill, Antung, on the afternoon of May 15, 1926. Chinese teachers and Christians were the prime movers. Speeches were made in the open air one after another, all crying against the alleged Japanese arbitrariness. As is common on such occasions, a young Chinese of the name of Li, 21 years old, bit off the tip of one of his fingers and wrote in his own blood his determination to get the wrong redressed. Then the excited throng started in a procession, with bugles sounding and drums beating, to the District Superintendent's office."

The concealment of the facts on both the Chinese and Japanese sides pertaining to this controversy at Antung make any fair appraisal quite impossible here. The case illustrates however, the type of problem which confronts the student who would seek to be at all realistic.

administrative area, with a few exceptional plots, and it is doubtful if the issue of the validity of titles dating back to the war period could be effectively raised on the part of China.[30]

[30] *Japanese Jurisdiction at Changchun*

Changchun, which lies just south of Kuanchengtzu, the town designated in the treaty of Portsmouth as the northern terminus of the railway to be transferred to Japan, is today far more important in every respect than the old town of Kuanchengtzu. At both these places, however, the Japanese have large areas which are administered by the South Manchuria Railway Company. At Kuanchengtzu the Japanese acquired the lands formerly possessed by the Chinese Eastern Railway and plots have been added to these to facilitate the transporting of freight cargo destined for the Chinese Eastern. In passing, it should be said also that by virtue of the Russo-Japanese agreement of June 13, 1907, which provided for the connection between these two railways, the Russian-controlled Chinese Eastern was to be permitted to run on five-foot gauge tracks directly into the Changchun station.

Changchun was opened to international residence and trade in pursuance of the Sino-Japanese agreement of December 22, 1905. The Chinese Government set aside an area to be formed into an international settlement or commercial area, but a part of this was obtained by the Japanese for inclusion within their railway settlement. Today there is an International Commercial Area at Changchun, but no part of it borders on the South Manchuria Railway. It lies between the so-termed "attached lands" of the South Manchuria Railway and the native Chinese city, and, incidentally, contains the Soviet Russian Consulate. Practically all the Japanese residences and business establishments are situated inside the Japanese "railway settlement".

The Mukden correspondent of the *North China Daily News* was responsible for the following statement, dated Mukden, Feb. 1, 1908: "West Changchun is the name given to the new Japanese settlement of about 1,000 acres, which has been seized by the railroad and independent colonists on the land originally set apart for an international foreign settlement." (*Vide:* Lawton, *op. cit.*, Vol. II, p. 1164). This correspondent asserted that there were repeated instances of Japanese occupation of Chinese property between 1905 and 1908, either with

very inadequate payment to the Chinese owners or none at all. When the Japanese consul-general at Mukden denied this assertion the correspondent replied: "It is, of course, no valid disproof of a statement merely to make an assertion contrary thereto, as the Japanese Consul should realize. No one objected to the occupation of premises during the war by the army for military purposes. The objection lies in the continued occupation of many of these premises after military exigencies have ceased to exist. Some of the buildings have been restored, but others have not, and cases on record both in Antung and Mukden, can easily be quoted in support of this contention." (Lawton, *op. cit.*, p. 1165).

The manner of exercise of Japanese jurisdiction at Changchun and within the "railway settlement" is not unlike that at Mukden, Antung and Yingkow. Changchun has, however, been the locus of numerous controversies between the Japanese and Chinese, one of the most important of which occurred during the hostilities between Soviet Russia and China over the Chinese Eastern Railway in 1929. On August 8, 1929, some Chinese troops attempted to pass through the South Manchuria Railway areas on their way toward the Chinese Eastern Railway. Only fortunate diplomatic handling of the issue prevented a clash with the Japanese troops. Subsequently, the Japanese Government designated Changchun as the headquarters of the Japanese garrison in South Manchuria, and large barracks have been constructed there to house the troops. In September an incident occurred which resulted in diplomatic representation on the part of China. To recount the details of the fracas which then occurred would serve no purpose here except to show the bitterness of this conflict over jurisdiction, especially where Japanese soldiers are concerned. It was, however, caused by the fact that the Japanese troops were conducting maneuvers in an area recognized as being under Chinese jurisdiction.

CHAPTER VIII

Japanese Administrative Rights: Taxation

1. The Tax Power in the South Manchuria Railway Areas. The simple and usual rule of politics that taxation is an evidence of sovereignty has little or no application to the South Manchuria Railway areas. Sovereignty, the ultimate right of disposing of land rights and the ultimate right of deciding the destiny of a portion of territory, clearly remains in this case with the Chinese Government, for the South Manchuria Railway is a concession railway, limited in the period of possession by the Japanese to the remainder of the ninety-nine years which is the full term of the lease. It is, however, a well-known principle of politics that the state which possesses sovereignty over a territory can, by self-restriction, alienate from itself one or more of those administrative and judicial rights and confer them upon another.[1]

Consequently, as in the case of a political lease—the Kwantung leased territory—or over areas temporarily possessed by a foreign state in the form of a long-term railway concession—the South Manchuria Railway—the partial or complete exercise in practice of such administrative and judicial rights

[1] Willoughby, W. W. *An Examination of the Nature of the State*, p. 196. (1911 ed.)

by a foreign state is no evidence of actual sovereignty over the territory in question. The South Manchuria Railway, then, is a temporary possession of Japan in international law, a possession which falls short of complete ownership. China's ultimate right to recover the railway and its lands is explicit in numerous agreements with Russia before 1905, and, later with Japan.

The South Manchuria Railway Company does, in fact, levy and collect taxes of various sorts in areas which in practice are under their jurisdiction. The legal source for this authority, however, cannot be found in explicit statement in any agreement with China. In the Japanese view, the right to tax Chinese and foreigners residing in these areas is derivable from one of two sources or both: either the general grant of political administrative authority implied from the French text of Article 6 of the original 1896 railway contract agreement, granting Russia, and therefore Japan, the absolute and exclusive right of administration of its lands, or from what may be termed a principle of equity. By this latter term is meant the obligation, reasonable and ethical, of foreigners and Chinese residing in these areas to contribute a fair share in the form of taxes to the Japanese administrators in return for obvious services received, such as police protection, the use of the highways and public utilities, and the numerous benefits which are derivable from the very fact of residence in areas where the existence of ordered

administration is conducive to peaceful residence and profitable prosecution of business enterprises.

There are, however, in connection with this complicated subject of the Japanese assumed right to levy and collect taxes within these railway areas, several highly interesting phases which may be cited first to confuse, and then to clarify, this tax situation. The most interesting of these, perhaps, is the fact that the issue of the Japanese right to tax, to compel collection of those taxes, and to resort to procedure in Japanese courts to this end, has never been either clearly raised or definitively settled so far as foreigners are concerned. Again, the early history of Japanese instructions to the South Manchuria Railway Company, and of the company's efforts to levy and collect taxes upon the property of foreigners residing there is evidence of the careful effort of the Japanese Government to avoid bringing the issue to solution by diplomatic representation and negotiations. With respect to Japan's power to tax foreigners, moreover, it is evident that, while taxes are levied and collected from foreigners, the procedure is rather in consequence of an agreement concurred in by each private foreigner so taxed, than the result of an admission on the part of foreign states that such taxes can be collected as a matter of legal right, derivable from Japan's agreements with China concerning the railway and these areas. Finally, in the case of foreigners—Americans, British and Russians, for example—a curious situa-

tion has arisen in the South Manchuria Railway areas which is suggested by the statement that, while the railway administration may levy and collect taxes upon foreigners in practice, the Japanese have not the legal right to arraign foreign dissentients in Japanese courts of whatever nature to compel execution by attachment of their property or by imposing other fines or forfeitures.

It may be well, before giving detailed attention to this subject of taxation in the railway areas, to compare Japan's legal authority here with that which is possessed in the Kwantung leased territory. Approaching the subject, as does Dr. M. Royama, by emphasizing the administrative interlocking of the Kwantung Government and the South Manchuria Railway Company, it is possible to understand, though not to agree with, his description of "the Railway Zone as nothing but an extension of the lease of Kwantung province".[2]

But this subjective approach avails us nothing if our purpose be to study the legal bases for the exercise of administrative and judicial authority in these two areas. It is rather conducive to confusion, and to consequent misunderstanding of the true legal bases for the exercise of administrative functions. The Kwantung leased territory is, in international law, an international political lease, and in that character is unique, and not to be confused with a

[2] Royama, M. "The South Manchuria Railway Zone", in *Pacific Affairs*, November, 1930, p. 1032.

railway concession. Foreigners residing in Dairen, for example, are obligated under international agreements and under Japanese constitutional law to pay to the Japanese governmental agencies whatever taxes are imposed upon them. Their only recourse, in case of alleged unreasonable taxation, is in the Japanese courts. By common consent of foreign states, foreign consuls residing in the Kwantung leased territory derive their exequaturs from the Japanese Government, not from China, and consequently the extraterritorial privileges available to them under their China treaties granting them consular jurisdiction over their own nationals for certain purposes, have no application at all in the leased territory.[3] Japan's right to levy and collect taxes from foreigners residing in the South Manchuria Railway areas, however, if such can be conceded at all as a legal right, is entirely otherwise, as will be described presently.

Moreover, it is unnecessary to give lengthy consideration to the differences prevailing within the South Manchuria Railway areas and the "concessions" and "settlements" elsewhere in China, principally because the instances of foreigners obtaining long-term property leases—by which we mean thirty years and renewable—within these railway areas are very few if at all existent. The wide

[3] *U. S. v. A. W. Smith,* April, 1925. (U. S. District Court for China: Cause No. 2331, Criminal No. 947.) *Vide:* Young, *The International Legal Status of the Kwantung Leased Territory,* Chapter V.

diversity of land titles possessed by the Japanese in these railway areas makes impossible any perfect analogy between them. Foreigners obtaining property in the South Manchuria Railway areas do so usually merely through rental on an annual basis, and obtain such rentals directly from the possessors of the land, whether in lease or otherwise, whether from the railway company or from the private Japanese possessors. The taxes paid by foreigners are not land taxes, but a " public fee ", the former being paid by the Japanese themselves, to the Japanese or Chinese authorities as the legal nature of the particular land would require.

How the Japanese Government instituted the system of tax collection from foreigners as well as Chinese, and, of course, from Japanese, residing in the South Manchuria Railway areas, without bringing about a diplomatic determination of the very issue of the legal right to levy such taxes requires attention here. On June 7, 1906, the Imperial Japanese Government promulgated an ordinance sanctioning the organization of the South Manchuria Railway Company, the same to be a " joint stock company ", the shares of which might be owned by the Japanese or Chinese Governments, and by nationals of these two countries.[4] By various provisions of this ordinance the South Manchuria Railway Company was made a government-controlled enterprise, the presi-

[4] MacMurray, Vol. I, pp. 555 ff. Imperial Ordinance No. 142, June 7, 1906. *Vide:* Young, *The International Relations of Manchuria,* pp. 62 ff.

dent and members of the board of directors being appointed by the Japanese Government. A second Imperial Order of August 1, 1906, countersigned by the ministers of communications, finance and foreign affairs (Yamagata, Sakatani and T. Hayashi, respectively) detailed the functions of the railway company, and included Article 4 which, besides conferring upon the company the functions necessary to operate the railway system as a commercial enterprise, provided that " business relating to land and buildings on the land attached to the railways " and additionally " any business for which Government permission has been given " shall appertain to the company.[5] Article 5 conferred on the company authority to establish and maintain public utilities, educational enterprises and sanitary services within its areas, while the next article specifically sanctioned the levying and collecting of " fees of those who live within the area of lands used by the railways ".

In the interval of approximately a year between this order to the company and the issuing of a company order more fully describing taxation procedure, the issue as to the fundamental right of taxation over foreigners was not presented to foreign governments for diplomatic negotiation and solution. Certain writers have alleged that the substance of the Imperial Order of August 1, 1906, was kept entirely secret from foreigners during the in-

[5] MacMurray, Vol. I, p. 557.

terval, but for this assertion there is no justification.[6] That there was, however, some question in the minds of foreign consuls, as at Mukden for example, as to the exact status of foreigners, is evident. The issue had never been aired diplomatically, and, during the months of 1907, the Harbin municipality controversy, which involved this same question of the right of a railway company to tax foreigners, was taking shape. There were at that time few Americans and British residing in the South Manchuria Railway areas, and it does not appear that any case arose to cause the British or American foreign offices to make representations to Japan on the issue.

2. The Right to Tax Foreign Residents. The Japanese Government had been careful to avoid any statement in these ordinances or company orders of the specific obligation of foreigners to pay taxes to the South Manchuria Railway Company. The company order which described in detail the nature of taxes leviable and the procedure for collection made no mention, by designation, of foreigners at all. This company order of September 28, 1907, provided that two types of taxes should be collected, a house tax, and a group of special taxes on trades, businesses and professions. Of these, only the former was general, the presumption being that every person, Japanese, Chinese or foreigner, residing in the railway areas would be subject to a tax whenever such residence lasted for more than three months.[7] The mis-

[6] *Vide: U. S. For. Rels.*, 1906, Pt. II, pp. 1050 ff.

[7] MacMurray, Vol. I, pp. 564-565. Harrison, *op. cit.*, pp. 250 ff.

cellaneous category of special taxes had to do with *geisha,* prostitutes, waitresses, carriages, jinrikishas, carts, butchers and places of public amusement, and, by their very nature, were generally not collectable at all from foreigners. Other special taxes might be imposed, but only after specific sanction by the president of the railway company. This, then, is the origin of the "public fee" ("*kohi*" in Japanese) which subsequently has been collected from all residents. As for judicial procedure to enforce tax collection, it is noticeable that no provision applicable to collection of taxes from foreigners or Chinese was included in the order.

Immediately after this company order of 1907 the railway began to collect taxes. Again, it does not appear that specific cases of protest on the part of foreigners arose to precipitate diplomatic action. As late as 1910, in fact, one well-informed writer, Mr. E. J. Harrison, who resided for considerable periods in Manchuria and was apparently quite familiar with the administration of the railway areas, stated that "so far, however, no protest has been made against" the levying of taxes by the Japanese.[8] Several circumstances contributed to this end: there were very few foreigners residing in these railway areas; the Japanese Government had acted, in imposing the tax law, so circumspectly that the diplomatic issue had been avoided; and, finally, the attention of the foreign offices, most noticeably that of

[8] Harrison, *op. cit.,* p. 251.

the United States, was absorbed by the Harbin municipality issue which involved Russian claims in the Chinese Eastern Railway areas. It was in connection with this latter situation that the American State Department made its sole official comment on the status of Americans residing in the areas of the South Manchuria Railway.

It will be recalled that the Japanese consul at Harbin encouraged Japanese nationals and representatives of business firms there to conform to the municipality regulations of 1909, which the American Government, acting through Consul Fred D. Fisher, refused to accept.[9] There is some evidence, however, that individual Japanese firms, including the agent for the South Manchuria Railway Company at Harbin, refused to pay taxes at Harbin, at least until 1910.[10] Mr. Korostovetz, the Russian Minister at Peking, during November of 1909, in conversations with the American *chargé,* Mr. Henry P. Fletcher, pointed out that, under the agreements of 1896 and 1898 pertaining to the Chinese Eastern Railway, the Russian Government had been given " absolute and exclusive right of administration of its lands ", a grant which Korostovetz interpreted to be blanket authority for exercising municipal administration, including tax collection, in the railway's areas. He affirmed that the South Manchuria Railway Company, so far as its power to collect

[9] *Vide:* Chapter II, Section 2.
[10] *U. S. For. Rels.,* 1910, p. 224.

taxes from foreigners was concerned, had rights identical with those of the Russians at Harbin, since the original 1896 and 1898 contract agreements were the source of their authority.[11] The Russian Minister, therefore, expressed "surprise" that the State Department should not see fit to protest against the action of the South Manchuria Railway Company and Japan at the same time.

Chargé Fletcher informed the State Department of these views, and the reply of the department, a communication of Acting Secretary of State, Mr. Huntington Wilson, dated January 7, 1910, is the only public expression of the American Government's attitude toward the issue with respect to the South Manchuria Railway areas. The importance of this statement, both for its commissions and omissions, justifies its quotation in detail:[12]

"An examination of the report upon Japanese jurisdiction in Manchuria, to which you refer, fails to show that the South Manchuria Railway is allowed to exercise any political powers, but that, 'subject to the Government's permission', it makes 'arrangements for engineering works, education, sanitation, etc., within the areas of land belonging to the railway and may collect fees from residents thereon'. The truth of this statement is confirmed by an examination of the Government order in the matter. (See Rockhill's *Treaties,* etc., Vol. II, p. 191).

"The imperial ordinances relating to the government of the leased territory of Kwantung indicate that the police administration over the railway areas is under the control of this Kwantung general government and not that of the railway

[11] *U. S. For. Rels.,* 1910, p. 227.
[12] *Ibidem,* pp. 227-228.

company. On the other hand, as you are aware, Mr. Straight's No. 207, of Feb. 22, 1908, inclosed a translation of certain regulations concerning branch councils in places along the railway which put the administration of the settlements in the hands of the railway company. It may be urged, however, that the South Manchuria Railway is practically a government railway and that its status is therefore different from that of the Chinese Eastern Railway Company, which is purely commercial and which has been created by a private organization (the Russo-Chinese Bank) itself subject to consular jurisdiction in Manchuria. . . . .*

"Should it appear that any private corporation is making claims similar to those of the Chinese Eastern Railway at Harbin, the attitude of the United States towards such claims would necessarily be determined by the principles just stated.

"The department has received no complaints from American residents along the South Manchuria Railway of any infringement of their extraterritorial rights nor of any exercise by the company of political powers, and would like to learn whether in your opinion the statement of the Russian authorities that the South Manchuria Railway Company exercises powers similar to those claimed by the Chinese Eastern Railway Company, is correct."

Concerning this official statement of interpretation of the rights of the South Manchuria Railway Company several points are exceedingly interesting, the first of which is that the matter seems thereafter to have been dropped without issue. Consul-General Willard D. Straight at Mukden had kept the State Department fully informed of this situation and com-

* In its status as a private commercial corporation, the South Manchuria Railway Company is now, and always has been, "*subject to consular jurisdiction*".

municated translations of the company order imposing taxes upon all residents in these areas. But more important is the fact that the State Department quite obviously avoided the issue raised by Minister Korostovetz as to the source of legal right to exercise any jurisdiction at all, whether by the South Manchuria Railway Company or any other functionary delegated by the Japanese Government. In the American Government's protests to the Russians in connection with the Harbin municipality dispute, not only the Russian attempt to deprive American nationals of their rights under their extraterritorial treaties with China, but the exercise of any political functions by the Chinese Eastern Railway was questioned. Consequently, when the Department explained that it had received no complaints from American nationals " of any exercise by the [South Manchuria Railway] company of political powers ", it either refrained from action because of the absence of a particular case, or entirely refused to face the essential issue itself.

It could hardly be argued that tax collection itself is not a political power. And whether the Kwantung Government, or some other functionary of the Japanese Government, had been authorized as a matter of administrative policy to police the railway, such authorization itself could not have been made by the Japanese Government unless it possessed the very rights which it sought to dispose. There is, therefore, considerable justification for

the opinion expressed by Mr. E. J. Harrison at the time, that Russia was made the scapegoat.[18] But, for our purposes here, it is but necessary to draw two conclusions: one, that the issue as to the legal right of Japan to tax American residents in the South Manchuria Railway areas was left entirely open by the State Department, and, two, that the United States would insist on observance of American extraterritorial rights under their China treaties.

What, then, has been the practice with respect to Japanese taxation of foreigners residing in the South Manchuria Railway areas? The situation today is very much as it was in 1908. It is the practice for foreign nationals, including Americans and British, to pay taxes levied upon them whenever they reside in, or possess business offices in, the railway areas. They do so in accordance with private agreements with the local Japanese authorities made at

[18] Cf. Harrison, *op. cit.*, pp. 210-211. There was, however a distinction in the method by which Russia and Japan sought to exercise jurisdiction over foreigners. The Russian officials in Harbin actually went so far as to demand of Mr. Fred D. Fisher, the American consul, that he obtain permission from Russia to open the American consulate there. The Japanese, on the other hand, were careful not to interfere with American extraterritorial rights, and the American consul in Mukden lived in the International Commercial Area outside the Japanese railway areas. Mr. Lancelot Lawton, equally well informed and somewhat less opinionative than Mr. Harrison, noted that in both these cases a "vital principle" was involved, for Japan might be expected to claim the same rights as Russia. He noted that Japan "argues that as so few foreigners have up to the present settled on these lands the question of municipal control does not seriously arise". (Lawton, *op. cit.*, Vol. II, pp. 1312 ff.)

the outset when they began their residence in these areas. An American wishing to establish residence for one purpose or another in the railway area, say at Mukden, agrees as a matter of equity to pay such reasonable taxes as may be imposed upon him, in return for the privilege of residence, protection and the benefits of the municipality's public utilities. This agreement is entirely of a private contractual nature, and, though approved as a matter of working principle by the American consulate at Mukden, is unofficial in so far as the American Government is concerned. This was the practice which the South Manchuria Railway Company instituted in 1908, and is the practice today.[14]

I may add that, after some inquiry into this situation at Mukden, I have found that Americans con-

[14] *Vide: U. S. For. Rels.*, 1910, pp. 230-231. This provision is somewhat similar to the condition under which foreigners were permitted to reside within the perpetual lease areas of a national concession of another state in such places at Hankow, Canton and Tientsin. The difference, however, is noteworthy in that these perpetual lease areas were leased as so-called "concessions" to particular foreign governments by the Chinese Government, exclusively for residential purposes, and only at the open ports in question. Other states might have acquired similar concessions at these places. Along the South Manchuria Railway, however, these areas are owned, leased, or administered by the railway company, which is a semi-government institution, having, on the other hand, the status of a private company, as, for example, in its rights to extraterritorial privileges in China. Usually, the railway areas include practically all the land lying between the native Chinese city and the railway itself. Apparently, there is no provision in the agreements with China which would justify a Japanese claim—and none has been made—to the effect that these railway areas are reserved exclusively for Japanese residence.

tinue to pay such taxes just so long as they consider them reasonable and uniform, and that, in cases of contest, they usually adjust the differences out of court. To bring procedure against any such foreign subject would obligate the Japanese authorities to take the case, under extraterritorial treaties, to the consular courts of that national, the defendant, and, rather than do this, thus creating the possibility of raising the diplomatic issue involved, the Japanese have generally preferred to adjust these cases so as to give entire satisfaction to the foreigners without resort to judicial procedure at all.[15] Today, much as in 1908, there are very few Americans residing in these railway areas in South Manchuria, perhaps not over twenty in Mukden,[16] and none at all in most of the railway towns along the route. There are, however, hundreds of Russians * in these areas, as at Mukden and Changchun, but their relations with Moscow are usually very exceptional and not such as would raise this tax question as a matter of legal right.

In conclusion of this study of the right of the South Manchuria Railway Company to levy and collect taxes upon Americans, for example, in the railway areas it should be emphasized that Japan's right

[15] Such a case will be noted on page 254.

[16] There are, of course, quite a large number of Americans residing in the International Commercial Area in Mukden.

* When is a Russian not a Russian? When he is a "White Russian"—in Manchuria! (Suggestion: Many "White Russians" in Manchuria are *Chinese* nationals.)

of taxation is one which has never been officially conceded by the United States Government. The issue has not been clearly raised, and, consequently, has never been settled definitively. The fact that Americans are not only not prohibited by their government from paying such taxes, but are tacitly encouraged by the American authorities to do so, is no evidence of commitment on the legal issue itself. The practical arrangement serves rather to meet an anomalous situation wherein it appears that it is only reasonable and fair that Americans who accept the benefits of residence in these areas should also contribute their fair share toward the support of the instruments of administration which offer them protection and public services. One might venture, then, a view, which apparently is entirely in accord with the policy of the United States Government on this matter of taxation in the railway areas. The Department of State and its subordinates have always acted in this matter so as to leave the entire question of legal right open for future consideration if and when an occasion presents itself.

3. Taxation of Chinese. A particularly complicated situation appears in the attempt of the Japanese to exercise tax functions over Chinese nationals residing in the South Manchuria Railway areas. Aside from the fact that the great majority of Chinese in these areas do pay these taxes without any protest at all—and the Chinese population of these

areas is over 200,000 *—there is the question as to whether, in case of a particular protest by a Chinese national, the Japanese authorities would have recourse to judicial procedure to deprive him of his property or other rights for non-payment of taxes. Japanese officials of the South Manchuria Railway Company at Dairen have stated to me their views that property of a Chinese which exists in the railway areas may be attached by the Japanese consular courts for non-fulfilment of tax obligations, but that, as a matter of practice, this is rarely done.[17] The Chinese, of course, have no consular jurisdiction in these areas, as, from the Chinese point of view, the railway areas are part of the sovereign domain of China.

The official Chinese attitude toward this matter of the legal right to tax their nationals in these areas is, in fact, not unlike that of foreign governments, such as that of the United States. The Chinese Government have never explicitly admitted the Japanese right to levy and collect taxes in these areas, either from Chinese residents or from foreigners. That individual Chinese do pay the Japanese taxes is evidence, not of a concession of the legal right of Japan, but of a pragmatic adjustment to a situation which

* According to the Kwantung Government's report for 1929, the national distribution of population in the South Manchuria Railway "zone" (as of July, 1929), was as follows: Chinese, 228,263; Japanese, 107,233 (including Koreans); foreigners, 1,818. Total population, 337,314. The same authority gave 342,043 as the total as of December 31, 1929. (*Second Report on Progress in Manchuria to 1930*, p. 84.)

[17] It is, however, very doubtful if such a right can be said to exist.

has never been definitively settled by diplomacy. The Chinese Government, however, have entered official protests on numerous occasions against the assumption of the right of taxation by Japan.

A particularly knotty phase of this tax question in the South Manchuria Railway areas arises, on the other hand, from the Chinese efforts to collect taxes from their nationals residing in these areas. Here is an issue which for a quarter century has been bitterly contested—usually locally and with accompanying threat of force—by the local authorities of the two states. For some purposes, such as the customs and the salt gabelle, the South Manchuria Railway areas are clearly outside the scope of Chinese tax authority. For others, however, it is evident that the local officials continually seek to levy and collect a multitude of special taxes upon Chinese residing in the railway areas, including stamp and document taxes.[18] The plight of a Chinese living in

[18] Examples of such instances frequently appear in Manchurian Chinese and Japanese newspapers. Two Japanese newspaper accounts are illustrative, both from the *Manchuria Daily News* of Dairen. "Concerning the matter of forced sale of Chinese revenue taxes to the Chinese residents in the railway town, Changchun, that has been pending a few years past, the Chinese side, while still withholding its answer to the Japanese authorities concerned who protested against the unlawful taxation, has ceased to make Chinese residents in the railway town use Chinese revenue stamps by compulsion, and to place under police detention any of the Chinese not heeding the unlawful order once when he sets foot outside the Railway town". (May 25, 1926.) This report proved to be premature, as such levies continue. Another article (June 7, 1927) recounts that a Chinese tax collector at Haicheng (near Tashihchiao) sought to

one of these railway towns, therefore, may be less enviable, when double taxation actually occurs, than that of a Chinese residing in the Kwantung leased territory. He is a Chinese subject and as such may be forced to pay Chinese taxes. Problems arise constantly, however, when, in an effort to collect those taxes, Chinese officials run amuck of Japanese authority in, or on the outskirts of, the railway areas. The Japanese official view is that Chinese property in the railway towns cannot be attached by Chinese courts under any circumstances. It may not be approved legal language, but it is certainly a fair description of this situation, to say that, so far as the practice throws light upon the right to tax Chinese residing in the railway areas, here is a case of "catch as catch can".[19]

Particularly is this description appropriate to an unusually difficult situation which has constantly

compel the Chinese guild members to pay Chinese taxes, even though they resided in the railway town. The Chinese guild refused to pay the taxes "since the Chinese authorities had no power to levy a tax on any one residing in the railway town". This account states that there is no precedent for the same in the railway towns, and that the Japanese authorities entered protests.

[19] It may not be irrelevant to record, however, that all the taxes collected by the railway company in the South Manchuria Railway areas do not begin to pay the enormous costs of administration. Official figures show that by 1929 a deficit of no less than Yen 13,000,000 had been met by the company itself, and that the cost of conducting public utilities (exclusive of police) in the railway areas amounted to Yen 164,000,000 between 1907 and 1928 inclusive. (*Report of Progress in Manchuria:* 1907-1928, p. 91). Taxes collected from residents are uniform in application upon Japanese, Chinese and foreigners, and appear to be very reasonable, even low.

recurred along the entire area traversed by the South Manchuria Railway. The situation referred to arises when Chinese tax collectors, acting under instructions from the prefectural authorities, seek to collect " business taxes " on produce, especially on soya beans, which moves from interior points to these municipal areas which are under the administration of the South Manchuria Railway Company. Their effort is not to tax grain produce or beans which are destined solely for consumption in these railway towns, but to levy and collect taxes on such produce as is delivered there by carts for rail export to Dairen, and from there abroad. The fact is that enormous quantities of such produce constantly are moved into and out of these railway municipalities tax-free, routing of carts through the railway municipalities being an effective means of evading the Chinese taxes. To refuse the Chinese tax collectors the right to levy a uniform " business tax " (more properly, a " produce tax ") on such produce may lead to positive discrimination in favor of Chinese dealers operating with offices in the South Manchuria Railway areas. To concede the Chinese claim may, as readily, lead to discriminatory tax levies against these same merchants.[20]

[20] The most recent of such situations occurred at Kaiyuan, a central soya bean assembling mart, in the spring of 1931. On May 16, 1931, the Chinese tax office at Kaiyuan established several tax booths on the several roads leading to the so-called "railway town", the purpose being to collect a 5% ad valorem "business tax" on grain produce entering the area administered by the South Manchuria Railway Company. Commenting on the situation at Kaiyuan, the

In this particular situation, however, it is quite obvious that the attempt on the part of the Chinese to collect taxes on grain produce entering the South Manchuria Railway towns was merely an effort to apply a uniform tax law of Liaoning province, which had provided that this special "business tax" should be levied uniformly on all produce in transit, one initial tax to be paid where the goods were first assembled for transit, and the other when it arrived at its destination.[21] If any conclusion can be drawn from this highly controversial situation it would be that, if Japanese administrative authority is conceded for purposes of taxing Chinese in the railway towns, by no fair construction of that right can it be conceded that the Chinese are not entitled to place taxes of a uniform character on produce entering those areas.

The question, then, whether Japanese legal right actually exists, in the South Manchuria Railway areas, to tax Chinese residents, and, at the same time, to prevent the collection of taxes levied upon

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Japanese-owned *Manchuria Daily News* characterized this attempt at tax collection as "a plain trespass upon the Japanese authority of administration". Continuing, this organ declared: "It is virtually the economic blockade of the Railway Town of Kaiyuan, and the Chinese merchants, being obsessed with the most gloomy forebodings, applied to the Japanese Police and the S. M. R. District Agency to overlook payment of some of the required Chinese taxes [taxes levied on Chinese by the Japanese authorities] if necessary, but the Japanese authorities hold firm, since that would be no less than the renouncing of the Japanese authority to administer the Railway Area." (*Manchuria Daily News*, May 20, 1931.)

[21] *Manchuria Daily News*, May 20, 1931.

them by Chinese authorities, is an open question. It is a well-known fact that thousands of Chinese merchants, actually supported by their guild organizations in the railway towns, have taken up residence in these areas largely for the purpose of evading local Chinese taxation in Manchuria. Their acquiescence and even support of the Japanese policy of preventing Chinese authorities from collecting taxes, not only in the South Manchuria Railway areas, but in the approaches to these town-sites, can not be interpreted as being indicative of Chinese official acquiescence in the resulting situation. Officially the Chinese Government continue to protest this claim of right by the Japanese authorities of the railway areas, although it is noticeable that the Chinese delegation at the Washington Conference failed to enter a formal protest against this particular claim of right by Japan.

In view of the fact that there is evidently official Chinese acquiescence in the actual existence of the South Manchuria Railway areas as municipal units, it would seem that some form of tax authority over residents is justifiable on grounds of equity. If strictly legal criteria were to be considered, however, it would seem that the Chinese Government are entitled to insist upon a more effective limitation of the Japanese claims, especially as to " business " or " produce " taxes. As long as these Japanese-administered municipal areas exist it may be expected that the Japanese Government will insist

upon tax authority within them. The basic issue, therefore, is not the right to tax, but the more fundamental right of the Japanese to continue in possession of these railway areas which are evidently not necessary for the use of the South Manchuria Railway as an artery of commercial transportation.

CHAPTER IX

Japanese Administrative Rights: Judicial Authority

1. Extraterritoriality in China and the South Manchuria Railway Areas. The status of extraterritoriality in the municipal areas of the South Manchuria Railway throws considerable light on the nature of Japanese administrative and judicial authority there. There has never been any question as to the extraterritorial rights of foreign nationals, residing in these areas. Without exception, those who are nationals of states having extraterritorial treaties with China have been subject to the jurisdiction of their own consular officials in all cases where they were defendants in civil suits or accused in criminal cases. It is equally clear that the judicial authority exercised by Japanese officials over their own nationals in these areas is derived from the Japanese extraterritorial treaties with China. The result is that, in so far as judicial matters are concerned, these railway areas are regarded very much as any other part of China. Here, then, is a clear situation which makes impossible the assertion that the South Manchuria Railway areas are subject to the " absolute and exclusive administration " of the Japanese Government or of the railway company.

It is somewhat surprising, then, that several Japanese writers have sought to find legal authority for the exercise of judicial functions by their authorities in South Manchuria in the original railway agreements of 1896 and 1898, or have concluded, by some untenable process of reasoning, that the fact of the Russo-Japanese war and the subsequent peace of Portsmouth and the treaty and agreements of Peking in 1905 in some way conferred all administrative and judicial rights upon the Japanese Government. Dr. S. Ninagawa, for example, writing in 1913, contended that the railway areas were transferred from control by a private company (The Chinese Eastern Railway) to the Japanese Government, and that in consequence the provisions of the original agreements granting Chinese authorities the right to try their own nationals in these areas lapsed. Not only criminal cases, he wrote, but civil cases which affect the property and persons of all residents in these railway areas, should be subject to the exclusive jurisdiction of the Japanese Government.[1]

This view of Dr. Ninagawa has been well refuted not only by other Japanese writers, but by the obvious fact that the Japanese Government have always officially asserted that their exercise of judicial authority in the railway areas is derivable from their possession of extraterritoriality in China. Furthermore, if the procedure in criminal and civil cases in

[1] Ninagawa, S. *Japan's Rights in South Manchuria,* pp. 101 ff. (In Japanese.)

Japanese courts be any criterion of judgment it is quite clear that the entire Japanese judicial system in Manchuria, though subordinated for purposes of appeal to the judicial system of the Kwantung leased territory, is conducted exclusively by the Japanese consular authorities. Dr. K. Imai, writing in 1915, asserted that, while control over the South Manchuria Railway areas might be exercised by the company for purely administrative purposes on the principle of "*statutas realia*" over all residents in those areas, that control does not extend to jurisdiction in cases at law. The Japanese authority in this case is derived from their extraterritorial treaties with China and is exercised on the principle of "*statutas personalia*", the defendant in a civil suit and the accused in a criminal suit being subject to trial in a court of his own nationality.[2] Quoting at length from Dr. Ninagawa's book, Dr. Imai concluded that "there is no foundation in the treaties or from the real facts on which such a theory can be established".[3] He explained that "if the railway zone were to be regarded as Japanese territory Japan would be obligated to admit in this territory the consular jurisdiction of China". If the railway areas were sovereign territory of Japan, he continued, how explain the right of China to open to foreign trade and residence the very towns which are located within the railway territory? Nor can

[2] Imai, K. *Foreign Jurisdiction in China*, p. 260. (In Japanese.)
[3] *Ibidem*, p. 261.

the fact that Japan possessed the right to police the territories with railway guards or police be taken to exhibit the possession of judicial authority other than that derivable from the China treaties. Dr. Imai preferred to call the South Manchuria Railway territory a " foreign administrative area " with the understanding that its status is *sui generis*.[4]

Dr. S. Nagao, whose book on colonial railways was published in 1928, in spite of his effort to picture this railway as a " colonial railway " having broad administrative rights, was forced to the same conclusion as to jurisdiction. Admitting that these areas are not Japanese territory, but asserting them to be " a zone in which Japan's right of administration is perfectly operative, absolutely and exclusively ", he, nevertheless, added that " as to the judicial authority, it has been acquired on the strength of the extraterritorial rights of a foreign power ".[5] Dr. Nagao evidently did not realize that authority could not be " perfectly operative, absolutely and exclusively " if judicial authority had to rely on extraterritorial treaties for jurisdictional rights.

The most recent of Japanese students of the South Manchuria Railway and its administrative functions, Dr. M. Royama of Tokyo Imperial University, confines his interpretation to procedure in practice. He notes that " judicial cases within the zone of the

[4] *Ibidem*, p. 263.

[5] Nagao, S. *A Study of Colonial Railways*, p. 168. (In Japanese.)

South Manchuria Railway are under consular jurisdiction in accordance with the provisions of extraterritoriality of the Sino-Japanese Treaty ".[6] His statement, however, that China recognized in the Sino-Japanese treaty of Peking of December 22, 1905, that Russia transferred to Japan at Portsmouth the absolute and exclusive power of administration over the railway lines, is a little deceiving.[7] China did not recognize this by explicit statement at all, and, as has been evident throughout this study, there has always been some question as to the full import of that phrase in the French text of the original 1896 agreement. In describing this power, however, Dr. Royama does not state that the original agreements with respect to the Chinese Eastern Railway are the source for the exercise of judicial authority on the part of Japan. He is evidently in complete agreement with Dr. Imai that such judicial powers as may be exercised by the Japanese in these railway areas are derivable solely from Japan's extraterritorial treaties with China. These treaties are the following: the treaty of Tientsin, 1871; the commercial treaty of Peking, 1896; the revised commercial treaty of 1903; and the Sino-Japanese treaty and notes of May, 1915, with respect to South Manchuria and Eastern Inner Mongolia.[8]

[6] Royama, M. "The South Manchuria Railway Zone," in *Pacific Affairs*, November, 1930, p. 1022. Royama, "Japan's Position in Manchuria" in *Problems of the Pacific*, 1929, p. 542.

[7] *Problems of the Pacific*, 1929, p. 541.

[8] *Report of the Commission on Extra-territoriality in China. China* No. 3 (1926), p. 108. (*Brit. Parl. Papers by Command.*)

It may be added, to describe Professor Royama's views, that, recognizing that the stationing of consular police in South Manchuria is not a reasonable legal corollary of extraterritoriality, it would be poor *policy* for Japan to continue to hold that the right of policing the railway areas is derivable from extraterritoriality, since there is the danger that Japanese " have to fear the effect upon the police right when the proposed abolishment of extrality is discussed ".[9] He concludes that it would be well, as a matter of policy, for Japan to abandon this view. It may be said as to this interesting suggestion that the Japanese Government have never asserted that the right to police the railway areas and station railway guards in the South Manchuria Railway areas is derived from extraterritorial rights. Japan claims that this general right originates in the original railway agreements, and, if not clearly there, then, in the additional agreement attached to the treaty of Peking of December 22, 1905.[10] Professor Royama has apparently been influenced toward his opinion by the attempt of the Japanese Government to justify consular police *outside the railway areas,* as during the Chengchiatun incident in 1916, by claiming the right to station consular police in the interior to be a corollary of extraterritoriality.[11]

[9] Royama, M. *Pacific Affairs, op. cit.,* p. 1033.

[10] Note the grounds on which the Japanese delegation of the Washington Conference claimed the right of police. *Conference Proceedings,* p. 1088.

[11] Royama in *Pacific Affairs, op. cit.,* p. 1033. *Vide:* footnote.

That the view that Japan's judicial authority, so far as such is possessed in the railway areas, is derivable from Japan's extraterritorial treaties with China is not only the correct, but the official, view is evident from the interpretation placed upon this subject by the Japanese Government itself.[12] Moreover, the administration and procedure in the Japanese courts in South Manchuria serve to illustrate that the consular officials are responsible for trial of all Japanese residing in the South Manchuria Railway areas, in cases of first instance and involving all minor offenses. All civil cases, of whatever nature, are brought before the consular courts where the accused concerned are Japanese residing in the railway areas, while only felonious crimes are beyond their criminal jurisdiction.[13] Special judges are attached to the Japanese consulates-general at Mukden, Harbin and Antung, the judge at Mukden having jurisdiction there and at Tiehling, Chengchiatun and Newchwang; the Harbin judge also at Changchun; and the Antung judge at that place.[14] Of these places only Harbin and Chengchiatun are outside the South Manchuria Railway areas, and the fact that no distinction is made for judicial organization within the railway towns themselves indicates that Japanese consular jurisdiction is the sole authority for the exercise of judicial rights in these areas.[15]

[12] *Report of the Commission on Extra-territoriality*, p. 108.

[13] *Ibidem*, p. 109.

[14] *The Manchuria Daily News*, Sept. 11, 1926.

[15] The writer has recently received a private communication from an official of the Japanese Foreign Office to the following effect:

To this general statement one minor qualification needs, however, to be made. Where cases arise in the railway towns from violation of the local police regulations—police functions being administered not by the consulates or by the South Manchuria Railway, but by the Kwantung Government—there is apparently much confusion among the Japanese themselves as to the application of the Japanese law governing consular jurisdiction in China.[16] The fact is, however, that Japanese consular jurisdiction is applied inside the railway areas as well as outside.

Cases originating in the Japanese consular courts in Manchuria are subject to appeal first to the District Court at Dairen, and then to the Supreme Court at Port Arthur (Ryojun) in the Kwantung leased territory.[17] Aside from the early Japanese regula-

"The judicial authority of the Japanese Government does not differ in and outside of the Railway Zone."

[16] Cf. Royama, M. in *Problems of the Pacific,* 1929, p. 542. "As to the cases against the regulations of the police administration inside the Railway Zone, however, the application of the police regulations by the consular court is not self-evident. In other words, it is not clear whether the consular regulations which primarily are to be applied outside the Zone can be applied to the acts inside the Zone. A common opinion holds that the police regulations of the Kwantung Government can be applied by the consular court, because the said regulations are a development of the laws of the Japanese Government. . . . . It seems to me to be highly necessary that the legal nature of the administrative and the judicial jurisdiction over the Railway Zone should be clearly defined."

[17] *The Kwantung Government: Its Functions and Works,* p. 10. An exception is made in cases arising in the Japanese consulate-general in the so-called "Chientao" area, e. g., at Lungchingtsun. These may be appealed to a higher court at Seishin, Chosen (Korea), and from there to the high court at Keijo (Seoul). *Vide: Extra-territoriality Report,* p. 109.

tions governing law and procedure to be applied in their consular courts in China, a special law for Manchuria was published in 1908.

2. *Extraterritorial Status of Foreigners.* Our next problem is the status of foreigners residing in the South Manchuria Railway areas in their relation to judicial procedure. We have seen that the practice illustrates the principle that the Japanese authority to levy and collect taxes upon foreigners residing in these areas is derivable from working arrangements whereby each individual undertakes through a written contract to subject himself to taxation in these areas, and that the right to tax foreigners is by no means clearly derivable from any railway agreement or other treaty or diplomatic understanding with foreign states. But, if, for example, a foreigner should feel injured as a result of unreasonable tax legislation, what recourse would he have? He could desist from paying his taxes, and the only recourse that the Japanese authorities might have to recover them would be to bring procedure before the consular court of his nationality in the nearest consulate. The result is that few such cases arise and adjustments are made out of court. One case which came to my attention at Mukden in 1930 is illustrative. An American representative of a well-known business firm with world-wide agencies had established a distributing office in the railway town in Mukden. He employed Japanese assistants. Having been accustomed to pay the taxes imposed by the

municipal authorities, he, nevertheless, protested and refused to pay certain levies which he considered unreasonable and inequitable. The situation developed so that he was forced to replace several Japanese employees with Chinese. No suit, however, was entered against him in the American consulate at Mukden. The case was eventually settled without judicial procedure at all by a mutual agreement over the tax question.

The policy of the American Government here has been entirely in accord with that insisted upon in the protests of 1908 against the infringements by the Chinese Eastern Railway authorities of American extraterritorial rights at Harbin. With respect to the judicial authority in the South Manchuria Railway areas the Department of State declared during 1910 that, " should it appear that any private corporation is making claims similar to those of the Chinese Eastern Railway at Harbin, the attitude of the United States toward such claims would necessarily be determined by the principles just stated ".[18] Neither the United States, nor any other foreign state having extraterritorial treaties with China, has waived any extraterritorial jurisdiction over their nationals residing in the South Manchuria Railway areas. It was early understood that foreigners were subject to trial only in their own consular courts, in cases where they were defendants in a civil suit or the accused in a criminal case. Professor Asakawa

[18] *U. S. For. Rels.*, 1910, p. 228.

of Yale University, for example, wrote in 1908 that "it is also understood that the foreigners residing within the zones should enjoy the jurisdiction of their respective consuls, and it is emphatically declared, as has been said, that they should exercise the same rights and privileges as Russians and Japanese living in the zones under their respective authorities".[19] An exception appears only in cases where it is necessary for the Japanese police authorities to apprehend law violators arrested *in flagrante delicto*. In such cases the accused are forthwith turned over to their own consular authorities for trial.[20]

3. The Status of Chinese. The status of Chinese residing in the railway areas is not so clear, particularly if the practice be any evidence of the legal interpretation of Chinese rights in those areas. Japanese writers are not agreed as to whether Chinese are entitled to trial in their own courts. But the view

[19] Asakawa, K. *Yale Review*, August, 1908, pp. 203-204. Dr. K. Imai expressed the same view in 1915.

[20] "If a foreign national (inclusive of Chinese) after having committed an offence, absconds into a Japanese settlement or the Railway Zone, or in case a foreign national commits an offence in a Japanese settlement or the Railway Zone, it is the present practice that the accused is arrested by the Japanese authorities upon the request of the foreign authorities concerned and is delivered to them." (*Extraterritoriality Report*, p. 111.)

An interesting parallel case was the apprehension, trial, and conviction of the Korean assassin who shot and killed Prince Ito in the compound of the Harbin station of the Chinese Eastern Railway. The Russian gendarmes arrested the criminal on the spot, but, after examination by the Russian procurator in the Harbin court, he was delivered over to the Japanese consulate for formal trial.

of Dr. K. Imai is perhaps the most reasonable and acceptable. He held that, since the judicial authority of the Japanese possessors of the South Manchuria Railway areas was derivable solely from the existence of consular jurisdiction under extraterritorial treaties in China, no authority could be exercised over Chinese when the latter were defendants. "Chinese jurisdiction is enforceable over the Chinese", he said.[21] Again, "putting aside the real fact that China is still levying taxes on certain nationals in certain places of the railway zone, which is illegal because it violates the railway possessor's right, yet, as above stated, in the railway zone, other jurisdiction than that of the railway possessor, especially Chinese jurisdiction, is in reality still enforced".[22]

In practice, moreover, the Japanese authorities do permit local Chinese authorities of adjoining areas to try Chinese in civil cases arising, or for offenses committed, outside of the railway areas themselves. In these cases a formal request must be made for the rendition or extradition of the accused. The Japanese view is that property of a Chinese which exists in the railway areas cannot be attached in a Chinese court outside these areas. Chinese living in the railway areas are, in fact, neither subjects nor *protégés* of the Japanese Government, and are amenable to all general Chinese laws, though the attempts of the

[21] Imai, *op. cit.*, p. 260.
[22] *Ibidem*, p. 261.

Chinese to collect certain taxes, such as "business," stamp and document taxes, from their nationals living within the railway areas are frequently obstructed by the action of the Japanese.[28]

One may venture an interpretation of the judicial rights of the Chinese in these railway areas which squares with the Japanese official interpretation of the jurisdiction of foreign consuls under their extraterritoriality treaties. The right of extraterritoriality is not a general right of foreigners in China. It is possessed just so far as it has been specifically granted by China to particular states. Is it conceivable, then, that the Chinese themselves possess less of right than they have conferred upon foreigners? A state cannot dispose of a right which it does not possess. By conferring extraterritorial rights upon foreigners, including also the Japanese themselves, the Chinese Government obviously must be understood to possess ultimate sovereignty over their territory even where, as in "concessions", "settlements", and the South Manchuria Railway

[28] *Manchuria Daily News*, May 25, 1926; June 25, 1926. The confusion over the legal status of these railway areas where matters of adjudication are concerned is suggested by certain interesting terminology in a recent case arising in Mukden. Madame Wang Sung-yen, fifth wife of the late Marshal Chang Tso-lin, placed an action in the Japanese consular court in Mukden concerning the attachment of her property in houses rented from Japanese owners in the railway area for which she is alleged to have failed to pay the rent. The Japanese consular court is said to have declared, in handling this case, that "a South Manchuria Railway town, like Mukden, is a district of legal vacuity". (*Sic!*) The decision was reversed in the appellate division of the Supreme Court at Port Arthur. (*The Manchuria Daily News, Monthly Supplement*, Oct. 1, 1930.)

areas, certain administrative rights have been sacrificed. No other judicial authority has been granted to the Japanese in these railway areas, except such as is derivable from their extraterritorial treaties with China. Consequently, Chinese living in the railway areas cannot be subject to trial before the Japanese courts except in cases where the Japanese are defendants in a civil suit or the accused in a criminal suit. Other cases clearly are within the jurisdiction of the Chinese courts. A Chinese living either outside or within these railway areas is entitled to bring suit against a Chinese living within the railway areas in a Chinese court for, except by abuse of the privilege of extraterritoriality—for which there are numerous cases elsewhere in China—the Japanese courts can have no jurisdiction.

* * * *

It is an obvious conclusion, justified by the very policy of the Japanese Government itself with respect to judicial matters in the South Manchuria Railway areas, that the complete abolition of extraterritoriality in China would establish an entirely new régime in judicial matters in the railway areas in South Manchuria. To retain any form of judicial authority, Japan would have to fall back on the old Russian view that the French text of the 1896 railway agreement conferred upon the railway authorities judicial rights in the broad and much-mooted clause relating to " absolute and exclusive right of

administration ". To do this would require an impossible reconciliation of that clause with the specific clauses of the railway agreement of 1896, which very clearly excluded Chinese from jurisdiction of the Russian courts.

It may be repeated, then, in summary, that with respect to the right of taxation and of adjudication Japan's authority in the South Manchuria Railway areas is clearly qualified. In the absence of a new treaty arrangement with China, the general abolition of Japanese and other extraterritorial privileges in China would clearly result in two important changes as to jurisdiction of the courts in the South Manchuria Railway areas. In the first place, Chinese law and procedure would be legally applicable by their own courts to the South Manchuria Railway areas. In the second place, foreigners, other than Japanese, would neither be subject to the jurisdiction of their own consular courts, nor to that of Japanese courts, but to those established by the Chinese Government. Probably as a result of official appreciation of this situation, the Japanese Government, during early 1931, were negotiating with Nanking in an effort to retain extraterritoriality in the South Manchuria Railway areas.

CHAPTER X

The Japanese Railway Guards and Police Rights

In the actual exercise of administrative authority over the South Manchuria Railway areas no institution has created more problems, and none has been the cause of more hostility among the local Chinese populace and officials, than that of the Japanese railway guards who are stationed along these lines. The problem is as old as the railway itself. Never a year has passed since 1906 when one or more unfortunate incidents have not occurred, resulting in the killing of Chinese by the Japanese guards, or of the railway guards or other Japanese police by Chinese. There is involved not only the question of the right to protect the railway itself by stationing guards along the right of way, or at the enlargements in the towns, but the almost inseparable question of the justification, claimed by the Japanese, to authorize their railway guards, consular police, or other troops or police, to carry this authority outside of the railway areas themselves, either to prevent disorder, brigandage or petty interferences with the railway, or to apprehend those accused of crime in the railway areas themselves. There is, in fact, a long list of innocent civilians who have been injured or killed since 1906 as a result of this system of policing the South Manchuria Railway areas.

Aside from the innumerable occasions on which these incidents have been the subject of diplomatic representation by China or Japan, or of protest and counter-claims by local authorities in Manchuria, usually at Mukden, the subject of Japanese railway guards and police has been raised by the Chinese representatives at international conferences, including the Paris Peace Conference, and the Washington Conference on limitation of armament and on Pacific and Far Eastern questions. The diametrically opposed views of the Chinese and Japanese delegations at the Washington Conference on this question, not only as to legal rights, but concerning the actual facts of the practical situation in South Manchuria, may well be considered in our analysis.

1. The Washington Conference and Japanese Railway Guards. The Chinese delegation at the Washington Conference in 1921 raised the question of foreign troops and police in China along with a group of questions involving additionally such extraordinary examples of foreign control as postal agencies and electrical wire and wireless communication installations. Minister Alfred Sze opened the discussion by a direct request that the conference adopt a resolution to the effect that no single state should maintain railway guards, and these other evidences of foreign authority, upon Chinese soil, " except in those specific cases in which the Powers desiring to do so may be able to show by affirmative and preponderant evidence and argument that it has

the right so to do such as can be defended upon the basis of accepted principles of international law and practice and with the consent of the Chinese Government ".[1]

The Conference committee, realizing the far-reaching significance of such a resolution, favored postponement of the general discussion until time had been given for the delegates of each country concerned to prepare their statements. On the following day, November 29, 1921, the Chinese delegation presented a detailed statement, which, in so far as it concerned the status of Japanese railway guards and police in the South Manchuria Railway areas (and in the " interior " of Manchuria), made the following points: The Chinese delegation favored the adoption of the proposed resolution proscribing foreign railway guards and police on the ground that their continuance was a violation of the sovereign rights of China. The import and meaning of the resolution were explained in such a manner as to indicate that it was the Japanese railway guards and police in Manchuria and in Shantung

[1] *Conference Proceedings,* p. 982. Continuing, Mr. Sze declared: " The proposition surely stands self-evident that, if a nation asserts a right to maintain troops, or guards, or police, or to erect and operate systems of communication upon the soil of another State, whose sovereignty and independence and territorial and administrative integrity it has just solemnly affirmed and obligated itself to respect, upon that State should lie a heavy burden of proof to justify so grievous an infringement of the rights of exclusive territorial jurisdiction which international law as well as a general sense of international comity and justice, recognizes as attaching to the status of sovereignty and independence." (*Ibid.,* p. 982.)

which were considered most obnoxious to China.[2] The detailed list of specific foreign troops and police then presented contained, in the main, a statement of the Japanese forces in Manchuria.[3] That such troops, railway guards and police were actually maintained in Manchuria by the Japanese Government was conceded by the Japanese delegation.[4]

Proceeding, then, at once to the legal basis for the stationing of such troops, railway guards or police in the South Manchuria Railway areas, or in Manchuria generally outside these areas (commonly designated the "interior"), the Japanese official justification for their claim of right should be recalled. Mr. M. Hanihara, speaking with reference to the proposed Chinese resolution for withdrawal of foreign troops and police, drew attention to Mr. Sze's statement of an exception for such foreign police agencies as could be justified by reference to specific treaty arrangement or commitment of China. He declared, however, that foreign troops or police should not be withdrawn immediately "simply because the Chinese authorities have not given them their express consent".[5] "There are," asserted Mr. Hanihara, "specific reasons for the existence

[2] Foreign troops and railway guards stationed under the Boxer Protocol of 1901, as well as foreign police in foreign "concessions" and "settlements" were specifically excluded from the application of the resolution. (*Conference Proceedings*, pp. 988, 1004-6.)

[3] *Ibidem*, p. 988.

[4] *Ibidem*, p. 1004. Statement of Mr. Hanihara.

[5] Ninth Meeting of the Committee on Pacific and Far Eastern Question, November 29, 1921. *Conference Proceedings*, p. 1000.

of such institutions in each special case." The Japanese delegation, therefore, opposed the Chinese resolution. His justification for the stationing of Japanese railway guards along the South Manchuria Railway was as follows:[6]

"The Japanese Delegation wishes to explain, as succinctly as possible, why and how the Japanese garrisons in various parts of China have come to be stationed there. At the outset, however, I desire to disclaim most emphatically that Japan has ever entertained any aggressive purpose or any desire to encroach illegitimately upon Chinese sovereignty in establishing or maintaining these garrisons in China.

"Japanese railways guards are actually maintained along the South Manchuria Railway and the Shantung Railway. . . .

"The maintenance of troops along the South Manchuria Railway stands on a different footing [from the Shantung railway guards]. This is conceded and recognized by China under the Treaty of Peking of 1905. (Additional Agreement, Art. II.) It is a measure of absolute necessity under the existing state of affairs in Manchuria—a region which has been made notorious by the activity of mounted bandits. Even in the presence of Japanese troops, those bandits have made repeated attempts to raid the railway zone. In a large number of cases they have cut telegraph lines and committed other acts of ravage. Their lawless activity on an extended scale has, however, been effectively checked by Japanese railway guards, and general security has been maintained for civilian residents in and around the railway zone. The efficiency of such guards will be made all the more significant by a comparison of the conditions prevailing in the railway zone with those prevailing in the districts remote from the railway. The withdrawal of railway guards from the zone of the South Manchuria Rail-

[6] *Ibidem*, pp. 1004 ff.

way will no doubt leave those districts at the mercy of the bandits, and the same conditions of unrest will there prevail as in remote corners of Manchuria. In such a situation it is not possible for Japan to forego the right, or rather the duty, of maintaining railway guards in Manchuria, whose presence is duly recognized by treaty."

At a later meeting of the Committee, Mr. Hanihara even more definitely rested Japan's claim of right to maintain railway guards and police in Manchuria on practical grounds, growing out of contemporary conditions, than on strictly legal grounds of treaty right.[7] His statement follows:

"I should state in all frankness that the stationing of our troops and police in some parts of China, is solely due to our instinct for self-protection. It is admittedly a costly and thankless undertaking to maintain our troops and police in a foreign land. We should only be too glad to be relieved of that responsibility, if the [an] efficient system of protection and control over our nationals resident in China were in operation.

"In this connection, I can only repeat the significant fact that there exists a state of affairs in China, which, apart from the question of treaty rights, renders necessary the presence of foreign troops in the very capital of China."

From these official declarations of the Japanese delegation at the Washington Conference it is clear that the claim of right to maintain Japanese troops and police, including railway guards, in Manchuria was based on two assertions: (1) that an actual treaty right existed for the stationing of such rail-

[7] Thirteenth Meeting of the Committee, December 7, 1921. *Ibid.*, p. 1088.

way guards along the South Manchuria Railway, namely, as contained in Article 2 of the Additional Agreement attached to the Sino-Japanese treaty of Peking of December 22, 1905; and (2) that, while such a treaty right existed the compelling reason for continuing to station such guards was the fact that it was " an absolute necessity under the existing state of affairs in Manchuria—a region which has been made notorious by the activity of mounted bandits ". Developing the latter emphasis in a later meeting of the Committee, Mr. Hanihara repeated that " apart from the question of treaty rights ", the existing state of affairs in China " renders necessary the presence of foreign troops ".

The emphasis placed on the second reason is important because it creates the impression that the maintenance of Japanese railway guards along the South Manchuria Railway was admitted to be a temporary necessity, and that the claim of right to station them there would be abandoned when actual conditions of established order in South Manchuria warranted their withdrawal. A full statement of the official Japanese position at the Washington Conference, as stated by the Japanese delegates in their own words, has been given here because, except for such claim of a right of intervention as has been asserted since then, but without calling it just that, the Japanese Government do not seem to have altered this position down to the present. We have, then, in these assertions, what may be characterized

as a statement of Japan's present claims.[8] It is, in the main, a claim of expediency and necessity, rather than one of treaty right.

Mr. Sze, speaking for the Chinese delegation, supported his resolution requiring the withdrawal of all foreign troops and police from China (except such as were provided for under the Boxer Protocol and in the "concessions" and "settlements") with a detailed statement of the distribution of Japanese forces in Manchuria, in which he drew a distinction between Japanese troops (which include the "railway guards") and their police forces in the "interior".[9] As to the claim of legal right to maintain the railway guards along the South Manchuria Railway, he asserted that the provisions in the Russo-Japanese treaty of Portsmouth which bound the two states to limit their railway guards to fifteen per kilometer "were not assented to by China in 1905".[10] Apparently realizing that this last assertion was technically in error—because of the subsequent sanction which the Chinese Government made to certain provisions of the treaty of Portsmouth—Mr. Sze made the following statement on December 2, 1921:[11]

"As to the grounds for stationing Japanese troops along the South Manchuria Railway, Japan appears to rely on the Ad-

[8] Japan's claim of a "right of intervention" in Manchuria is developed in the writer's volume in this series titled: *Japan's Special Position in Manchuria*, Ch. XI.

[9] *Conference Proceedings*, pp. 990-998.

[10] *Ibidem*, p. 990.

[11] *Ibidem*, pp. 1042-1044.

ditional Agreement to the Treaty of December 22, 1905, between Japan and China, and on the disturbed conditions in Manchuria."

It may be essential to explain here, for purposes of clarity, that there are, in fact, three separate treaties or agreements of 1905 which bear on this question of the Japanese right to station railway guards along the South Manchuria Railway. The first is the treaty of Portsmouth of September 5, to which China was, of course, not a party. The second is the treaty of Peking of December 22, between China and Japan. The third is an "Additional Agreement" between China and Japan which was attached to the latter treaty, having been negotiated simultaneously. Mr. Sze at this juncture referred to each of them, a pertinent article in the treaty of Portsmouth being quoted in full as follows: [12]

"Article III. Japan and Russia mutually engage:

1. To evacuate completely and simultaneously Manchuria except for territory affected by the lease of the Liaotung Peninsula, in conformity with the provisions of additional Article I annexed to this Treaty; and

2. To restore entirely and completely to the exclusive administration of China all portions of Manchuria now in the occupation or under the control of the Japanese or Russian troops, with the exception of the territory above mentioned. . . ."

He then quoted Article 1 of the Sino-Japanese treaty of December 22, 1905, which provides simply for the approval of the Chinese Government to the

[12] MacMurray, Vol. I, p. 523. *Conference Proceedings*, p. 1042.

transfers made in the treaty of Portsmouth.[13] Finally, he quoted Article 2 of the so-called "Additional Agreement" of December 22, which was, in fact, the only grounds on which the Japanese Government could base a claim for the treaty right to maintain railway guards along the South Manchuria Railway.[14]

"Article II. In view of the earnest desire expressed by the Imperial Chinese Government to have the Japanese and Russian troops and railway guards in Manchuria withdrawn as soon as possible, and in order to meet this desire, the Imperial Japanese Government, in the event of Russia agreeing to the withdrawal of her railway guards, or in case other proper measures are agreed to between China and Russia, consent to take similar steps, accordingly. When tranquillity shall have been reestablished in Manchuria and China shall have become herself capable of affording full protection to the lives and property of foreigners, Japan will withdraw her railway guards simultaneously with Russia."

The somewhat ambiguous terminology of this provision will be considered later. Its intent, however, was interpreted by Mr. Sze to mean that the arrangement was but a temporary expedient, necessitated by the aftermath of the Russo-Japanese war. His statement follows:[15]

"Russia has withdrawn her troops from Manchuria but Japan has retained hers, as she states, under Article II of the Additional Agreement quoted. China has time and again offered to take over the protection of the South Manchurian

[13] MacMurray, Vol. I, p. 550. *Conference Proceedings*, p. 1040.
[14] MacMurray, Vol. I, p. 551. *Conference Proceedings*, p. 1042.
[15] *Conference Proceedings*, pp. 1042, 1046, 1048.

Railway and requested Japan to withdraw her troops. If Japan continues to maintain that the alleged existing state of banditry in Manchuria requires the presence of Japanese troops as a 'measure of absolute necessity', China may never have an opportunity to show that she is capable of affording protection to the lives and property of foreigners. Moreover, the mere presence of Japanese troops themselves makes for friction with the natives and arouses, rather than allays, disorders throughout the adjacent districts. The Japanese Delegation refers to a 'large number of cases' of cutting 'telegraph lines' and commiting 'other acts of ravage'. These cases do not appear to be serious ones. Similar cases occur every day even in the best regulated States. But in China, especially, many cases of disturbance may be traced directly to the presence or activities of Japanese troops along the railway.

"Consequently China asks to be given an opportunity to show that she can maintain order along the South Manchurian Railway. The opportunity can only be granted if Japan will withdraw her forces, which China asks be done for the reasons given. The present conditions of Japanese military control have continued for over fifteen years and on the present contentions of the Japanese Delegation may be prolonged indefinitely at the will of Japan. China cannot continue to submit to these infractions of its territorial and administrative integrity and asks the Conference to take definite measures to bring these irritating controversies to a close."

* * *

"To endeavor to defend the maintenance of Japanese police in Manchuria by saying that they do not interfere with Chinese or other foreign nationals, that their functions are restricted to the protection and control of Japanese subjects, and that their duties are to prevent the commission of crime by Japanese and to apprehend Japanese criminals, is to lead the Conference far afield from the point at issue, namely, the illegal and unwarranted infraction of Chinese territorial and

administrative integrity. The reasons advanced have never been regarded in international law and practice as sufficient to justify the institution of police administration in a foreign friendly country."

Here, then, are the Japanese contentions in support of their claim of right to maintain railway guards along the South Manchuria Railway, and the Chinese rebuttal. The Washington Conference failed to take any action specifically directed to the matter of Japanese railway guards in Manchuria, the issue being evidently considered one more of fact than of law.[16] The Japanese delegation had plainly preferred to base their claims principally on grounds of

[16] The French delegation favored reference of the question of the facts as to alleged disorder in South Manchuria to the newly proposed Commission on Extraterritoriality. Mr. Hanihara favored the suggestion, but Mr. Sze strongly opposed it on the ground that the issue of foreign troops in Manchuria was an obvious impairment of China's sovereignty not countenanced by any treaty. The British delegation favored some form of inquiry into the true state of affairs in China, Sir Robert Borden stating that "The Japanese Government was entitled to an assurance that China was able to afford adequate protection to the lives and property of foreigners". (*Ibid.*, p. 1054.) The Conference, however, in deference to the desire, expressed by Mr. Sze, that no special Commission of Inquiry should be directed to proceed to China to investigate conditions there, merely adopted a resolution, strongly advocated by Mr. Root, to the effect that the diplomatic representatives of the various powers in Peking should be instructed by their governments to associate themselves with three Chinese members in a commission to investigate the matter "whenever China shall so request". China subsequently made no such request, and nothing has been done with regard to this subject since the Washington Conference, except in so far as changes have come about in the policy of one or another state having interests in China. In Manchuria, the Japanese "armed forces" remain as before. (*Ibid.*, pp. 1194, 184.)

necessity created by an alleged state of disorder in Chinese territory adjoining the South Manchuria Railway. A careful review of their official statements at the conference gives much evidence that the Japanese Government considered the strictly legal basis for their claim, as contained in the treaties referred to above, a rather unreliable one. Mr. Hanihara had only referred indefinitely to the article in the " Additional Agreement " with China which is Japan's sole source for such a treaty right: he did not quote the article itself. Mr. Hughes, the chairman, in the ninth meeting of the Committee (November 29), had himself read the article and had asked Mr. Hanihara if that were the article he referred to. Mr. Hanihara replied in the affirmative " but thought there was another clause which he promised to look up ".[17] This " other clause " was never reported to the conference. But, at a later date (December 7), Mr. Hanihara made a final statement which reverted to the alleged treaty right, placed a somewhat specious interpretation upon it, finally resting Japan's claim on pragmatic necessity:[18]

" Turning to the subject of the South Manchuria Railway guards, Mr. Sze's observation on the interpretation of the Additional Agreement to the Treaty of 1905 seems to us hardly convincing. The fact pointed out by the Chinese Delegation that Russia has withdrawn her troops from Manchuria apparently refers to the condition of things created by the existing anomalous situation in Russia. It does not prove that

[17] *Conference Proceedings*, p. 1006.
[18] *Ibidem*, p. 1088.

Russia has definitely agreed to the withdrawal of her troops as it contemplated in the Sino-Japanese Agreement of 1905.

"That Agreement also provides that when tranquillity shall have been reestablished in Manchuria and when China shall have become herself capable of affording full protection to the lives and property of foreigners, Japan will withdraw her railway guards simultaneously with Russia. Referring to that provision, I would like to invite the attention of the Committee to the actual conditions described in the written statement which I shall presently lay before you.*

"As for the contention that China should be given an opportunity of proving her ability to maintain peace and order in Manchuria, the reply is obvious: Japanese interests and Japanese security are matters of such importance that she [Japan] cannot afford to take obvious risks. By taking such chances as are suggested we should do no good either to China or to ourselves. We should not pander to a sentimental idea at the risk of creating grave international difficulties in a region which has already been the source of a life-and-death struggle on the part of Japan, in a war which did more to preserve the integrity and independence of China than perhaps any other that has ever been fought."

To conclude our consideration of the respective merits of the Japanese and Chinese contentions at the Washington Conference on this most important subject, it is appropriate to include a summary, tersely phrased, and inclusive of the very core of the issues presented (as might have been expected, in any such case, from the man whose powers are at

* This statement set forth in great detail incidents to show the "condition of lawlessness and unrest prevailing in the interior of Manchuria". *Ibid.*, pp. 1090 ff.

their best in just such analysis), by Mr. Charles Evans Hughes, chairman of the Committee.[19]

"While listening to the replies and counter-replies of the Chinese and Japanese Delegates he had realized that there were certain broad considerations of fact underlying the statements of both parties. As he understood it, all the Japanese statements—and this applied equally to the Treaty of 1905—came to the same thing: Japan offered to withdraw her troops when China accorded adequate protection of life and property. China now offered that protection, and requested the immediate withdrawal of the troops. The question as to whether China was able to provide protection would involve a complicated and detailed investigation of facts regarding such matters as the number of police needed, etc., which could scarcely be undertaken in the Committee itself."

The Washington Conference, then, made no constructive proposal directed particularly toward the existence of the Japanese railway guards in South Manchuria. The importance of the discussion of this subject lies rather in the fact that opportunity was afforded for the first and only thorough consideration of the treaty and other legal grounds for Japan's claim of right to maintain such guards. The outcome was simply that the Japanese Government rested their case on alleged practical necessity for stationing such guards, rather than on the ground of

[19] *Ibid.*, p. 1048. Mr. Hughes consequently suggested its reference to a sub-committee. This was done, Mr. Elihu Root being the chairman, with the result that nothing came of it (in spite of Mr. Root's earnest desire to do something to assist China in this regard), except the general resolution for a commission of inquiry which would proceed to investigate only when the Chinese Government saw fit to request it to do so.

an established and continuing treaty right. This conclusion is important, because there is a tendency today for Japanese writers to go beyond the official claims set forth by the Japanese delegates at the Washington Conference and to seek justification for continued maintenance of the railway guards indefinitely, either on the ground that the right was inherited from the Russian régime in Manchuria, or in virtue of a claim of the right of intervention to preserve the peace and order not only of the railway areas, but of contiguous areas, and, in fact, of the whole of Manchuria.[20]

2. Japan's Claim of Right to Maintain Railway Guards. Japan did not inherit the right to station railway guards along the South Manchuria Railway from previously existing rights of Russia. The right cannot be traced to any grant of power in the original railway contract agreements of 1896 and 1898 bearing on the Chinese Eastern Railway, under which the Japanese now operate the South Manchuria Railway. In neither of those agreements is there any mention of "railway" guards, while the basic agreement of 1896 clearly reserved to China the right to provide for protecting the line from external attack.[21] If, however, the authority to pro-

[20] This subject is developed in the author's volume: *Japan's Special Position in Manchuria,* Ch. XI.

[21] Dr. Hawkling Yen, a member of the Chinese delegation at the Washington Conference, in the twenty-fourth meeting of the Committee on Pacific and Far Eastern Questions (January 23, 1922), in speaking against the report of the technical sub-committee on the

vide for "protection" of the line, contained in Article 6, were to be invoked in favor of the present Japanese system, it could evidently not be interpreted as justification for stationing of "railway guards". The most that might be derived, then, from the original contract agreement of 1896, made with Russia, is a claim of right to establish a civilian police force, limited to civilian duties, and presumably only such a force as might be reconcilable with the existence of a military patrol force maintained under Chinese authority.

Following the Boxer Rising the Russian Government made strenuous efforts in Peking to secure specific sanction of such a right, but, on this point, more evidently than on any other, the Chinese Government refused to admit the Russian proposals. Consequently, the evacuation agreement of April 8, 1902, made no mention of "railway guards", but contained a provision whereby China was obligated to "secure within the borders of Manchuria the safety of all Russian subjects".[22] Russia was care-

Chinese Eastern Railway question, made the following assertion: "In this connection, it may also be pointed out that the precedent of a Russian guard has no legal ground, as it was expressly stipulated in the Agreement of 1896 that it was the Chinese Government which was to take measures to assure the safety of the Railway and of the persons in its service." (*Conference Proceedings*, p. 1380.) (*Vide:* Chapters I and II of this study.)

[22] MacMurray, Vol. I, pp. 326-329. Cf. *China*, No. 2 (1904) *British Parl. Papers*, p. 5. Professor Asakawa's statement, therefore, made in August, 1908, that "China does not appear to have questioned at any time before the war Russia's right, as such, to detail railway guards" is hardly accurate. (*Yale Review*, Aug. 1908, p. 195.)

ful, however, to insert clauses in this agreement which made impossible of fulfilment the condition that China should prevent hostile occurrences in the future. China was prevented from instituting a police force in the railway areas of the Chinese Eastern, but it is evident that the right to police these areas by Russian "railway guards" was not granted. The arrangement cannot be interpreted as other than a temporary one. It was clearly an anomaly—a conventional agreement never meant to be observed by Russia—and the practice illustrated the unilateral construction and violation of the agreement by Russia. Had these original Sino-Russian agreements been the sole source for the Japanese claim to station railway guards along the South Manchuria Railway it is evident that it would have been faulty and entirely inadequate to justify legally the policy adopted by the Japanese Government after Portsmouth.

Nor did the treaty of Portsmouth confer upon the Japanese the right to police the railway areas. The Russian Government could not dispose of a right which they did not possess, and the treaty, which was a treaty of peace, was, of course, binding only as between the two signatories. Between them they agreed to limit their "railway guards" to fifteen per kilometer on the lines they were subsequently to control.[23] This was, then, a limitation, binding as between the two parties only, which, as far as Japan

[23] MacMurray, Vol. I, p. 526.

was concerned, was a limitation of a right yet to be acquired from China.[24]

Such rights as Japan possesses under agreement with China to maintain railway guards in South Manchuria are derivable solely from the Sino-Japanese treaty and "additional agreement" of Peking, dated December 22, 1905. It is the latter agreement which contains China's consent to the particular provision of the Portsmouth treaty which limited the guards on the South Manchuria Railway to fifteen per kilometer. The nature of the right granted to Japan and the avenues left open for divergent interpretation by the two governments, where subsequent policies were bound to clash, can only be fairly judged when the article itself is read *in toto*.[25] It was obviously meant to be but a temporary arrangement.

This article, and not the right claimed by the Japanese to station consular police in Manchuria as a corollary of their extraterritorial privileges, is the source of the official Japanese claim of a treaty basis for stationing railway guards in the railway areas. A clear distinction should be drawn between police rights in the railway areas and the right to station consular police at consulates which may be situated far removed from the railway itself. That there is

[24] The Chinese Government, immediately after the Portsmouth Conference, protested, through their Minister at Washington, against the continuation of railway guards along the Russian and Japanese controlled railways in Manchuria. (The *Japan Chronicle*, Sept. 28, 1905, p. 421.)

[25] Quoted above in the previous section. MacMurray, Vol. I, p. 551.

confusion, born of interlocking in the several police forces which are maintained by the Japanese in Manchuria, should not lead the student to presume that one right flows from the other.[26] In passing, it may be said that this claim of right to station large forces of consular police anywhere in Manchuria is itself admitted by certain Japanese writers, including Dr. M. Royama and Dr. J. Shinobu, to be contrary to strict law.[27]

Referring, then, to this article of the "Additional Agreement" of December 22, 1905, its substance, its context, and historical evidence of the period supports the interpretation that, so far as the intent of the two signatories is discernible, this provision relating to maintenance of Japanese "railway guards" was meant to be but temporary.[28]

[26] *Vide:* Professor M. Royama's article in *Pacific Affairs,* November, 1930, pp. 1032-1033.

[27] *Vide:* Shinobu, S. *Studies in Manchurian Questions.* (Published by the Japanese Council, Institute of Pacific Relations, Tokyo, 1929, in Japanese.)

Referring to the settlement of the Chengchiatun Incident (1916), whereby the Chinese Government successfully contested the assertion of the Japanese that the right to station consular police was a corollary derivable from extraterritoriality, Professor M. Royama concludes: "It must be admitted that the argument of the Chinese Government would be right if only the interpretation of international law mattered in this connection." (*Pacific Affairs,* Nov., 1930, p. 1033, Footnote.)

[28] Asakawa, K. *Yale Review,* Aug. 1908, p. 199. "It should also be remembered in this connection that the two Powers engaged that the number of the guards for the railways, which should be maintained only till China had proved herself competent to enforce order, should

Japan recognized the earnest desire of the Chinese Government to have all Russian and Japanese troops and railway guards withdrawn as soon as possible. Japan, explicitly expressing an intention to meet that desire, agreed to withdraw not only her troops—which were, in any event, to be withdrawn by 1907 under the Portsmouth agreements—but also her " railway guards ". But such withdrawal was conditional on one of two subsequent developments, or both, either when Russia by agreement with China withdrew her railway guards in the Chinese Eastern areas, or when peace and order should have been reestablished and " China shall have become herself capable of affording full protection to the lives and property of foreigners ". Academically, there has been much higgling as to the meaning of these conditions of withdrawal, Chinese writers holding that Japan agreed to " uniformly and similarly act " with Russia, and that, since the Russian guards were withdrawn in 1918, Japan was then obligated to withdraw her guards. Japanese writers, on the other hand, have held to a strict legalistic interpretation of the article, and have asserted that, while Rus-

never exceed fifteen men per kilometer. These two new provisions were, it is evident, intended by Japan, the party which had proposed them, fundamentally to modify the terms under which the railways had been exploited by Russia, so as to prevent the recurrence of those military evils which, before the war, had imperilled the sovereignty of China and the peace of the Orient." *Vide:* Hsü, Shu-hsi, article in the *Chinese Social and Political Science Review,* April, 1931. " The *post bellum* situation, of course, has long ceased to exist." (p. 43.)

sian guards were not withdrawn in consequence of any agreement with China, but rather by compulsion during the disorder following the Russian Revolution when the Chinese Eastern Railway was actually taken over by the Chinese, there yet remains one additional condition to be fulfilled. They affirm that China has not showed herself capable of affording full protection to foreigners in South Manchuria.[29]

At best, the Japanese claim of a right to maintain railway guards along the South Manchuria Railway is, from a strictly legal point of view, one which rests on a rather infirm treaty foundation.[30] The claim that Russian guards are maintained along the Chinese Eastern Railway would be, of course, erroneous, since the Chinese Government have taken over protection and policing of this entire railway system after 1917, or, to be more exact, entirely independent of any other foreign police, after 1923. Whatever justification there might have been for an assertion in 1921 that the Russian guards had been withdrawn without an agreement to that effect, such an assertion today would be unconvincing. The agreements of 1924 between Soviet Russia and China for the operation of the Chinese Eastern Railway are evidence that Soviet Russia has not reasserted

[29] Cf. *Problems of the Pacific,* 1929, pp. 188-189.

[30] That this is true was evidently recognized by the Japanese delegation at the Washington Conference, since it is evident that their claims were based not so much on any treaty as on the alleged "absolute necessity" of providing for "self-protection." *Ref.* previous section.

the Tsarist Russian claim of a right to patrol the railway.

The only issue, therefore, which remains, is whether Japan is entitled to fall back on the alternative condition that China must give evidence of having established order in areas contiguous to the South Manchuria Railway. There can hardly be necessity for discussing this subject farther, except to present certain conclusions which would seem to be entirely in accord with the realities of this situation. The article in the "Additional Agreement" of December 22, 1905, which gave Japan a temporary right to maintain "railway guards" along the South Manchuria Railway was obviously meant to be but a temporary arrangement, a condition, in fact, of Japanese withdrawal, not only of her troops after the war with Russia, but of her "railway guards" as well. A quarter century has passed since then. To rest a claim today to continue the system of railway guards on such a technical provision could hardly be approved by any fair-minded individual or tribunal of justice. The issue which remains, then, is one, not of law, but of policy. The only claim to a legal right to continue the maintenance of the Japanese railway guards is such as may be derivable from international law—not a treaty—and international law knows no such right on the soil of another, except in so far as it may be associated with a "right of intervention". These judgments are directed solely toward the matter of the so-called "railway guards", which are, in fact, indistinguishable from

the regular Japanese garrison troops of the Kwantung leased territory, and are not intended to be applicable to such civilian police as might otherwise be justified under Japan's treaties with China bearing on the unique status of the South Manchuria Railway. In order that the ideas of the writer may not be misconstrued, it is perhaps important that he should take care here to enter the caveat that these judgments have bearing solely on the question of *juristic rights* involved. The writer reserves his judgment as to the questions of diplomatic policy involved. The issue of fact as to the actual condition of law and order in South Manchuria is one on which something will be said later.

3. The Organization of the Railway Guards, Police and Garrison Troops. There has always been confusion abroad as to the meaning of the term "railway guards". Their relation to the regular Japanese garrison troops in the Kwantung leased territory, to the municipal police in the railway towns, and to the Japanese consular police, attached to consulates in South Manchuria, has never been clearly stated except in Japanese language sources. For this confusion as to the "railway guards" themselves and the lack of authoritative interpretations in foreign languages the Japanese authorities are, of course, responsible.[31] But, although from a

[31] A statement made by Professor K. Asakawa of Yale University in 1908 is as true today as when it was made. "Japan has also police and gendarmerie forces at her less than ten consulates in southern Manchuria, and also at Chientao. Their numbers, though naturally

legal point of view each police function, whether in the hands of the " railway guards ", the municipal police forces or the consular police, should be clearly distinguished, the actual fact of the interlocking and possible identity of these forces at one time or another, and for particular purposes, has naturally served to confuse the legal bases for the exercise of police authority in each of these categories.[32]

In South Manchuria the Japanese maintain these four types of police agencies, and, of these, the first which must concern us are the railway guards themselves. These railway guards are not organized into a police force separate and independent of control from the commander-in-chief of the Kwantung Garrison. The railway guards are, in fact, regular Japanese soldiers who are stationed at various points along the South Manchuria Railway, especially at Changchun, Kungchuling and Liaoyang. In the days of Russian supremacy in South Manchuria their " railway guards " were distinguishable from their troops only by such devices as green arm-bands. The Japanese have been more frank. Their railway guards wear the uniform of the Japanese soldier—khaki or light brown with the red collar insets. To be sure, one occasionally sees a railway guard, who

small, are not stated, and they have been misrepresented by some critics as regular troops. A perfect publicity about this matter would greatly aid Japan." (Asakawa, K. *Yale Review,* November, 1908, p. 269.)

[32] This is not a study in " colonial administration ", and, therefore, only such details are here presented pertaining to the subject as are essential to an understanding of the *legal status* of each.

wears a different uniform, sitting in a seat "Reserved For the Railway Guard" in the day coaches of the South Manchuria Railway, but these are so exceptional as to prove the rule that the so-called railway guards" which may be seen in small numbers at almost any way-station of the main line between Changchun and Dairen are regular Japanese soldiers. Nor is this system necessarily to be criticized simply on the ground that no separate railway guard has been established, independent of the Kwantung Garrison. Uniforms do not change the system and when once the real purpose, from the Japanese point of view, for maintaining these "guards" is understood it is but natural, under present circumstances, that they should be drawn from the regular troops.

At the outset, during 1906, these railway guards were limited in numbers to approximately 12,000, usually one Japanese division, or an average of fifteen per kilometer, distributed along something over seven hundred kilometers of railway transferred from Russia to Japan.[33] The South Manchuria Railway Company was never authorized by

[33] "There are at present 782 kilometres of railway in Japanese hands in Southern Manchuria, and on this basis Japan may maintain just about the peace strength of one division of her army—to be exact, 11,260 men. Additional branches will mean additions to these figures, and as it is understood that a second division is to garrison the Kwantung leased territory, it may be assumed that Japan will have permanently in Manchuria 25,000 men". (B. L. Putnam Weale, *The Truce in the East and Its Aftermath*, p. 240; cf. The *Japan Chronicle*, Sept. 21, 1905, p. 383.)

the home government to exercise any responsibility for controlling these railway guards or for other police matters in the railway towns. The railway guard, like the municipal police, was made subject to the Kwantung Government-General by an Imperial Ordinance (No. 196 of July, 1906) which authorized the Governor-General to "take charge of the protection and supervision of the railway lines in South Manchuria", and made him subject to the Minister of War "with reference to matters of military administration and the personal affairs of the soldiers and of those connected with the Army".[34] But the Governor-General, under the law for the organization of the Government-General which replaced the post-war military régime, was to be a military officer of high rank. In matters of military operation and mobilization in case of hostilities, he was to report directly to the Chief of the General Staff in Tokyo; while, for ordinary purposes of civil administration he was made responsible to the Minister for Foreign Affairs, and indirectly, therefore, through the Foreign Office, to the Emperor.[35] Neither at that time nor later has a separate system of railway guards, independent from the Kwantung Garrison commander, been established in South Manchuria. This point has never been clearly

[34] MacMurray, Vol. I, p. 565.

[35] "For the first thirteen years (after 1906), the office of civil administration was still entangled with the military." (Royama, M. "Japan's Position in Manchuria", *Problems of the Pacific*, 1929, p. 540.)

brought out by any of the Japanese authors cited in this work or by any others whose writings have come to the author's attention.

Consequently, aside from the fact that the number of Japanese troops called "railway guards" is limited by treaty, the history of the administrative organization of the railway guard is inseparably related to, if not entirely described by, the history of the Kwantung Garrison. At the outset in 1906, as has been said, the Governor-General of Kwantung was a high military officer who was, concurrently with his civil administrative authority, commandant of the Kwantung Garrison. He was to "take charge of the defence of the territory within the limits of his jurisdiction" and, whenever he believed that emergencies had arisen, he was authorized to "employ military force".[36] As the number of troops which Japan might maintain in the Kwantung leased territory was unlimited by any treaty either with Russia or China, their numbers have been determined only by military policy. An emergency believed to have arisen by some international situation to the north, threatening for example the position of the South Manchuria Railway at Changchun, could be met immediately by the despatch of regular troops, identical with the railway guard for all practical purposes, to the menaced point.[37] Frequently the total of the railway guard has been considerably

[36] Imperial Ordinance, No. 196, 1906.

[37] For the actual number of Japanese troops maintained in South Manchuria at various times, especially during 1920, 1922 and 1923, see the account of a competent military language officer in Japan,

under the maximum set by the Portsmouth treaty, but, on a dozen occasions, reënforcements have been sent either immediately on the occurrence of some emergency or by the process of retaining a part of the old garrison troops for a period after the arrival of the biennial replacement troops. Generally speaking, these railway guards have been stationed at a half dozen principal stations, such as Changchun, Kungchuling, Mukden, Haicheng and Liaoyang, and have not been distributed along the railway right of way between the stations.[38] Japanese intelligence officers at Dairen have explained to me that such concentration at particular towns is necessary in the interest of discipline and efficiency of command.

Captain M. D. Kennedy. *The Military Side of Japanese Life,* pp. 175, 224, 305. Captain Kennedy considers The *Japan Year Book* an untrustworthy source for such figures. Mr. Roy Howard published in *The Japan Times* in its issue of Aug. 9, 1926, an article which gave the following figures for the Japanese railway guard along the S. M. R.: Total of 4 battalions with headquarters at Kungchuling—though formerly 6 battalions. Four battalions of infantry and 1 of cavalry along the Antung-Mukden line. Those along the main line between Changchun and Dairen included both infantry and artillery. (Same data in *The Harbin Observer,* Aug. 4, 1926). As of 1931, it appears that Japan would be entitled, if the 1905 treaty provision were today applicable, to maintain approximately 13,000 railway guards along the South Manchuria Railway. Actually at present there are about 9,000 Japanese soldiers in the area. The total length of the S. M. R. main line (Changchun to Dairen), the Antung-Mukden line and the Yingkow line is 615 miles.

[38] This is true today as when the following was written in 1906. "The troops, ostensibly retained to guard the railway, are not spread over the country engaged in police duties as one would suspect, but are concentrated at Mukden, Liaoyang, and other important towns, and they are to remain there in the future." (Ernest Brindle in The *World's Work,* Aug. 1906 pp. 7903 ff.)

A change was made in the form of organization of the Kwantung government in 1919 which abolished the Government-General (*Totoku Fu*) and replaced it with a civil government (*Kwanto Cho*) over which a Governor (*Chokan*) was placed. The Imperial Ordinance (No. 94) of April 12, 1919, which effected this change, relieved the Governor of command of the Kwantung Garrison and, therefore, of the railway guards, though he retained police authority in the railway towns for ordinary purposes.[39] The railway guards and garrison troops remaining in the leased territory were placed under the commander-in-chief of the garrison, a high military officer, who was responsible not to the Governor of Kwantung, but to the Minister of War and the Chief of the General Staff. The Governor may " request the Commander of the Kwantung army for the use of military forces ", but may not assume, independently, authority over either the railway guards or the troops at Port Arthur. The Kwantung commandant, on the other hand, was authorized to " comply with the requests of the Governor of the Province for the despatch of troops necessitated for the preservation of peace and order of the region under the Governor's jurisdiction and of the Railway Zone ", but, since he was appointed by, and responsible to, the military authorities in Japan, he might, if the military desired, take independent action.[40] The well-known independence of the military from the Pre-

[39] MacMurray, Vol. I, p. 569.

[40] Cf. Royama, M. *Pacific Affairs*, Nov. 1930, p. 1030.

mier or the Foreign Office, established by long practice and made particularly possible due to the constitutional right of direct appeal of the military to the Throne, has had the effect of making the railway guards in South Manchuria an instrument of a military clique in Tokyo, acting through the commander-in-chief of the Kwantung Garrison.

A civil police force has been established, independent of the railway guards, in all the railway towns of South Manchuria. The legal basis for such a police force is not derivable from the agreement of 1905 permitting the Japanese to station railway guards along the South Manchuria Railway. Japan evidently considers the stationing of municipal police forces in these towns as a right derivable from the general administrative authority assumed to be granted her in the original railway agreements of 1896 and 1898. These municipal police are not controlled by the railway company but by the Governor of Kwantung.[41] Such police may be found at the following towns along the South Manchuria Railway: Yingkow, Liaoyang, Mukden, Tiehling, Changchun, Antung, Anshan, Fushun Kaiyuan, Ssupingkai, Wafangtien, Tashihchiao, Penhsihu and Kungchuling.[42] Official publications of the South Manchuria Railway give the total number of such municipal police along the South Manchuria Railway as approximately

[41] Imperial Ordinances, Nos. 196 (1906) and 94 (1919). MacMurray, Vol. I, pp. 565, 569.

[42] *A Brief Sketch of the Kwantung Government*, p. 24.

3,000 men and officers, including 766 Chinese native policemen in the Japanese service.[43]

Finally, to complete the picture of the four types of police agencies of the Japanese in South Manchuria, it is necessary to comment upon the Japanese consular police. The Japanese Government have maintained such consular police at all their consulates-general and various consulates and branches in South Manchuria for many years, not only in the South Manchuria Railway areas, but at such places as Harbin and in the territory lying north of the Yalu river, the boundary between Manchuria and Chosen.[44] This right is not claimed by other foreign governments in China.[45] The important fact to note

[43] *Second Report of Progress in Manchuria to 1930*, p. 91. Figures are for March 31, 1930.

[44] Japanese consulates-general, consulates and branch offices have been established in Manchuria at the following places:

(1) *Consulates-General:* Mukden, Harbin, Kirin, and Lungchingtsun.

(2) *Consulates:* Yingkow (Newchwang), Antung, Liaoyang, Tiehling, Changchun, Chengchiatun, Tsitsihar, Manchouli, and Chihfeng.

(3) *Branch Offices* (sub-consulates): Hailung, Tunghua and Hsinminfu (responsible to Mukden Consulate-General); Hunchun, Paitsaokou, Chutzuchieh and Toutaokou (responsible to the Lungchingtsun Consulate-General in the so-called "Chientao Area" north of the Korean border); Taolu (responsible to Tiehling Consulate); Nengan (responsible to Changchun Consulate).

(4) *"Police Boxes"*, removed from regular consular offices, as, for example, thirteen in the so-called "Chientao" area.

[45] In November, 1930, there were approximately 400 Japanese consular police attached to the Japanese consular offices in the so-

about these consular police, then, is that they may, according to the Japanese claim, be stationed wherever there is a Japanese consular station, i. e., even outside the South Manchuria Railway areas. To this is linked another consideration, inherent in the organization of the Japanese administrative system in South Manchuria, which makes it possible for the Japanese consulates to draw upon the railway guards to reënforce the consular police.[46]

By the Imperial Ordinance (No. 196) of July, 1906, which established the Government-General of Kwantung, Japanese consular officers in Manchuria were authorized to be appointed additionally to posts as "secretaries" of the Government-General.[47] This meant not only that the Kwantung Government-General might have additional means of coördinating the various police and military services of Japan in Manchuria, but that the consular officials, as "secretaries" in the Kwantung Government, might draw upon the railway guard or the regular troops to aid the small consular police forces whenever an emergency was deemed to have arisen. The result has been that, while many incidents could be cited to show how the consular police have been quickly aug-

called "Chientao area" lying north of the Korean border. These included police officers at thirteen so-called police boxes removed from the consulates themselves.

[46] "The whole police force in the Railway Area is at the same time in the service of the consulate concerned." (*The Kwantung Government, etc.* p. 38; *A Brief Sketch of the Kwantung Government,* p. 23.)

[47] MacMurray, Vol. I, p. 567. Art. 21.

mented by railway guards or the municipal police along the South Manchuria Railway, an equal number of cases could be cited to illustrate how the Japanese troops, called railway guards, have proceeded to places outside the railway areas and the railway right of way even against the opposition of the Japanese consular officers. Japanese consuls in Manchuria are, of course, responsible to the Ministry of Foreign Affairs in Tokyo, while the railway guards and their officers are responsible to the Kwantung garrison commander-in-chief, and through him to the Ministry of War. The War Office frequently has acted with complete impunity from the Foreign Office.[48]

4. The Chengchiatun Incident of 1916. The legal right of the Japanese to station consular police in Manchuria has been officially contested by the Chinese Government, notably in the negotiations attending the settlement of the so-called "Chengchiatun Incident" in 1916. Japanese troops had not always confined themselves to the railway areas, and the fracas between them and the Chinese soldiery at Chengchiatun, a city to the west of Ssupingkai on the Ssupingkai-Chengchiatun railway—a Chinese Govern-

[48] One of the most recent illustrations occurred in the so-called "Chientao area" in the autumn of 1930. Japanese regular troops were sent from Chosen after a fracas between Chinese soldiers and Japanese policemen at Lungchingtsun which occurred on October 6th. When the time came for withdrawing the reënforcements, however, there was a difference of opinion between the Foreign Office and the War Office. (The *Seoul Press,* Oct. 11, 1930; The *Manchuria Daily News,* Oct. 8, 1930; The *Japan Chronicle,* Nov. 25, 1930.)

ment Railway, not under the management of the South Manchuria Railway Company—which occurred in August, 1916, led to an attempt on the part of the Japanese Government to acquire Chinese consent to an increase in the jurisdiction of Japanese "police" in South Manchuria.[49]

Japan demanded the punishment of the Chinese soldiery presumed to be responsible for this shooting affray, and submitted certain "desiderata" advanced to secure the right to station Japanese police officers in South Manchuria and Eastern Inner Mongolia, i. e., outside the South Manchuria Railway areas, without limitation as to their numbers. In an *aide mémoire* presented to the Chinese Minister for Foreign Affairs on October 18, 1916, the Japanese Government set forth that, under the Sino-Japanese treaty of May 25, 1915, pertaining to Manchuria, Japanese subjects were given the right to reside, travel and conduct commercial enterprises in the interior of "South Manchuria", and also the right to undertake agricultural enterprises and industries incidental thereto in eastern Inner Mongolia. These considerations, it was declared, necessitated the establishment of Japanese police stations in these interior places where Japanese nationals were be-

[49] Japanese troops had appeared at Chengchiatun as early as 1913. The "railway guard" battalion at Kaiyuan visited the place in the autumn of that year apparently without any particular hostility from the local Chinese soldiery. (*Manchuria Daily News*, Nov. 4, 1913.)

coming numerous, the specific purposes for stationing such police officers being set forth as follows: [50]

"The number of Japanese subjects in South Manchuria and Eastern Inner Mongolia will, therefore, inevitably increase gradually. The Imperial Government of Japan considers it necessary to station Japanese police officers in these regions for the purpose of controlling and protecting their own subjects. It is a fact that a number of Japanese police officers have already been stationed in the interior of South Manchuria and they have been recognized by the local officials of the localities concerned since intercourse has been conducted between them."

The *aide mémoire* stated further that the Japanese Government, therefore, "proposes gradually to establish additional stations for Japanese police officers in the interior of South Manchuria and Eastern Inner Mongolia wherever and whenever necessary". The statement concluded with the assertion that "the establishment of stations for Japanese police officers in South Manchuria and Eastern Inner Mongolia is based on consular jurisdiction, and its aim is efficiently to protect and discipline Japanese subjects, to bring about a completely satisfactory relationship between the officials and people of the two countries, and gradually to develop the financial relations between Japan and China". The Chinese Government were requested, therefore, "speedily to recognize the demands".[51]

[50] MacMurray, Vol. II, pp. 1349-1350. This exchange of correspondence is also printed in: *American Journal of International Law, Supplement*, 1917, pp. 112 ff.

[51] MacMurray, Vol. II, p. 1350.

On January 5, 1917, the Japanese Minister at Peking handed the Chinese Minister for Foreign Affairs a *note verbale* which referred to this *aide mémoire* and asserted that to withdraw this "demand" was impossible. In further justification of the demand for Chinese recognition of the right to station consular police in the interior, at whatever places and whenever the Japanese chose, the following assertion was made:[52]

"As the stationing of Japanese police officers is but a corollary of the right of extra-territoriality, not to speak of the fact that it does not in the least prejudice Chinese sovereignty, it will help to improve the relations of the officials and people of the two countries and bring about the development of economic interests to no small degree."

To these representations and demands the Chinese Government replied with a flat refusal. On January 12 the Minister for Foreign Affairs replied to the Japanese *note verbale* stating that "there is no necessity to station Japanese police officers so as to avoid conflict with the Chinese police rights", that the several police functions detailed in the Japanese communications belonged properly to the Chinese police, and declared that "the question of police cannot be associated with extraterritoriality". The Chinese reply further specifically declared that the Chinese Government "cannot recognize it as a corollary [of the right of extraterritoriality]".

[52] *Ibidem*, p. 1350.

"Ever since the conclusion of extraterritoriality treaties between China and the foreign Powers for several decades", the Chinese reply continued, "no such claim has ever been heard."[53] A definite protest was lodged with the Japanese Minister at Peking concerning Japanese police stations previously established outside the railway areas. What had become an incident of grave international significance, arising out of the unauthorized despatch of Japanese troops to Chengchiatun, where they had no treaty right to be, was made the occasion for demands upon China to grant the general right for the Japanese to station consular police wherever they had consular offices in South Manchuria. The Chinese were

[53] *Ibid.*, p. 1351. I find myself quite unable to accept the following statement of Professor Royama: "On the occasion of the Chengchiatun affair in 1916, when the Japanese Government demanded, as a condition of agreement, the extension of the police right over some other places, the Chinese Government, in reply, opposed simply the extension, presumably signifying its recognition of the police right of Japan over the zone." (*Pacific Affairs,* Nov., 1930, p. 1026.) The question of the right to police the South Manchuria Railway areas was nowhere an issue in the Chengchiatun negotiations, and the silence of the Chinese Government, at this juncture, was a proper attitude since to introduce the issue of the "railway guards" or police in the railway areas would have been tantamount to intruding an extraneous issue into these negotiations. The Japanese Government, furthermore, did not claim that they should be permitted to station consular police in the interior on the ground that the claim of a treaty right with respect to the railway areas should be extended to the "interior"; the Japanese claim here was solely on the ground that it was a proper corollary to assume from the existence of extraterritoriality. I find that Professor Hsü Shu-hsi's article, recently published, is in full agreement with this criticism of Professor Royama's assertion. (Cf. *The Chinese Social and Political Science Review,* Vol. XV, No. 1 (April, 1931), pp. 38-39.)

quite correct in officially stating that the matter raised by Japan as to the consular police had " no connection with the Chengchiatun case ". This incident was settled without ancillary commitments on the part of China which might be regarded as sanction for stationing consular police in South Manchuria.[54] But neither that incident, nor the events of subsequent years, has counselled the Japanese Government to change their policy with respect to stationing such consular police in Manchuria. That policy is neither justified by specific commitment of the Chinese Government, nor is it in accord with the policies of the other foreign states in China. Moreover, it has recently become the subject of criticism by leading Japanese scholars.[55]

[54] On this point the Chinese Government were very explicit: " The Chinese Government considers it necessary to request the Japanese Government to abandon the matter. At the same time, it is not to be construed as meaning that the Chinese Government has recognized any action to carry the matter into effect." (MacMurray, Vol. II, p. 1352.)

[55] Professor M. Royama of the Tokyo Imperial University, for example, has stated that " it must be admitted that the argument of the Chinese Government would be right if only the interpretation of international law mattered in this connection ". (*Pacific Affairs*, Nov. 1930, p. 1033. Footnote.) Professor J. Shinobu also declared at the Kyoto Conference of the Institute of Pacific Relations in 1929 that the legal justification for such a claim in international law is questionable.

Some sixty Japanese consular police officers are stationed also at each of the Japanese concessions at Tientsin and Hankow, together with about thirty in each of the following places: Shanghai, Tsingtao, Tsinan and Harbin. At other places there are smaller numbers. Except where these officers are stationed in Japanese concessions, they are, as a rule, civilian-clad and unarmed, being considered ordinary members of the consular staff.

5. Incidents Illustrating Problems of Interpretation. The purpose of this section is not to present any complete statement of facts pertaining to conditions in South Manchuria which may or may not justify the retention of the railway guards by the Japanese as a matter of policy. It is rather to select from the flesh and blood of historical incidents of the past quarter century—and these have touched the flesh and spilled much blood—which will serve to illustrate the nature of the problems that continually arise, and are bound to arise in the future, as long as conditions in South Manchuria remain as they are. Candor must compel the honest student of this subject to admit that the picture of continual banditry and disorder painted by Japanese writers on South Manchuria is much too highly colored, but fairness must compel him in the same breath to say that, while Manchuria as a whole has been better governed than most provinces of China, and there

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The special subjects of Japanese consular jurisdiction and the claim of right to maintain Japanese police at these consulates in Manchuria, outside the South Manchuria Railway areas, as well as the special subject of Japanese jurisdiction over and the status of Koreans, being Japanese nationals, in Manchuria, are not treated exhaustively in this study. These subjects appertain rather to Japanese jurisdictional rights *in the interior* of Manchuria, and may well be treated as distinct. Moreover, this entire subject of the extraterritorial rights of Japanese in Manchuria, outside the railway areas, in now one of negotiations between the Japanese and Chinese governments. At some future date it may be possible and desirable to supplement this volume with another, dealing with these subjects, as well as the question of the right to lease land in the interior and its relation to abolition of extraterritoriality.

have been fewer major civil disturbances there than in almost any other part of China, yet, as anyone who is really familiar with Manchuria must admit, banditry has not been stamped out, even in the territories lying adjacent to the Kwantung leased territory itself. This fact was admitted by the late Marshal Chang Tso-lin in a circular published immediately after the suppression of the mutiny of General Kuo Sung-lin in December, 1925, when he said: " Brigandage has not yet been suppressed in Manchuria; the official personnel is far from ideal; and the people of Manchuria have not yet enjoyed the benefits of good government." But the question which should concern the impartial student of this subject of the railway guards is not the prevalence of banditry in Manchuria generally, but whether, in the areas traversed by the South Manchuria Railway itself, conditions are such that the removal of the Japanese railway guards has so far been impossible.

Moreover, if Japanese official statements of *policy* are to be taken as evidence, what concerns Japan is not alone the condition of society in the areas adjoining the railway. In the background, ever since the Russo-Japanese war, has been the position of Russia in North Manchuria and in Mongolia. No doubt Japan considers that the stationing of troops in the form of " railway guards ", concentrated at such places as Kungchuling and Changchun, is, from a military point of view, justifiable. A third con-

sideration, particularly obvious in the past five years, is the fact, frankly stated officially as policy, that the Japanese Government consider the continual maintenance of these railway guards a necessary means of preventing the spread of Chinese civil war from south of the Great Wall into Manchuria. Of this the Japanese note to the Nanking Government, dated May 18, 1928, is declaratory: [56]

"The Japanese Government attaches the utmost importance to the maintenance of peace and order in Manchuria and is prepared to do all it can to prevent the occurrence of any such state of affairs as may disturb that peace and order or constitute the probable cause of such a disturbance. In these circumstances, should disturbances develop further in the direction of Peking and Tientsin and the situation become so menacing as to threaten the peace and order of Manchuria, Japan may possibly be constrained to take appropriate, effective steps for the maintenance of peace and order in Manchuria."

In the face of such a sweeping declaration, which asserts a right not based on treaty provisions at all, but one claimed under general principles of international law which might be cited to justify intervention to protect large vested property interests, it is obvious that Japan has no intention to be bound by any rigid legal terminology of treaty provisions originally intended as a temporary expedient.

Reverting, then, to the problems which arose from the maintenance of these Japanese railway guards

[56] *Current History* (N. Y.), July, 1928, p. 702. *Vide:* The writer's article, "Sino-Japanese Interests and Issues in Manchuria", in *Pacific Affairs*, Dec. 1928, pp. 1-20.

shortly after the Russo-Japanese war, one is presented with a picture of a period of about ten years which was marred by constant clashes between these railway guards and the local Chinese soldiery or civilians. Recall the demand of the Japanese for authority to extend this policing system to the Antung-Mukden railway in 1909.[57] China demanded the complete withdrawal of Japanese troops and railway guards from this line as a condition of settlement of the problem of Japan's right to continue to operate the line as a commercial enterprise.[58] The Japanese consul-general at Mukden refused Viceroy Hsü Shih-chang's request for removal of these soldiers, and the final agreement of September 4, 1909, ignored the Chinese protests which had been made during the preceding negotiations. Japanese railway guards have since been stationed along the Antung-Mukden line on the assumption that China's tacit consent to the inclusion of the line in the South Manchuria Railway system was sufficient warrant for extending the patrolling system in operation along the main line of the South Manchuria Railway.

At the same time there arose the question of the right of Chinese police to exercise jurisdiction over the approaches to the new station of the Peking-Mukden railway at Mukden. Japan had conceded a limited right to the Chinese police when the station

[57] Chapter VI, Section 4.

[58] *North China Herald,* April 10, 1909. *Problems of the Pacific,* 1929, p. 482.

was first located in the South Manchuria Railway area at Mukden, but when the new station was constructed, farther within the Japanese railway settlement, the Japanese consulate-general at Mukden refused to grant the right except by way of occasional dispensation. In 1910, as the *Manchuria Daily News* expressed it, this was particularly embarrassing to the Japanese when the Chinese chose to ignore the formality of making a request of the Japanese consul-general each time when Chinese police were to be ordered to appear in phalanx at the station to meet or bid farewell to some dignitary.[59] Such pinpricks as this are almost monthly occurrences in Manchuria today along the South Manchuria Railway.

During 1910 numerous instances were reported in the local press of Mukden and Dairen of altercations between Chinese and Japanese police along the railway which at times contributed to the already strained relations between the two countries produced by such major questions as the Fushun colliery titles, the Antung-Mukden railway, mining rights along that railway, border questions involving Koreans in the region north of the Yalu river, and the opposition of the Japanese Government to the Knox "neutralization plan" and to the specific project of the Chinchow-Aigun railway. In its usually reproachful mood, where Chinese claims were concerned, the *Manchuria Daily News* has pre-

[59] *Manchuria Daily News*, Dec. 20, 1910.

served an account of this irritant: "A flagrant instance of this practice—of transgression upon our police authority in the South Manchuria Railway areas—was enacted at Changchun Station yesterday where the United States Secretary of War, Mr. [Jacob] Dickinson, stopped on his homeward journey. The Japanese authorities will give warning to the Chinese against a recurrence of a like transgression"—that is, of arraying goodly numbers of Chinese soldiery at the stations on these ceremonial occasions.[60]

That Chinese bandits were particularly obnoxious, both in northern and southern Manchuria, in 1910 is evident. Repeated appeals of Viceroy Hsi Liang to Peking for reënforcements to the Mukden garrison, both to evidence a strong policy toward Russia and Japan and to provide adequate police forces for bandit suppression, were made during the year. The strained relations with Japan are suggested by the following newspaper item from Dairen: "Viceroy Hsi Liang, disturbed by the rumors of Japanese reënforcements coming into Manchuria, is reported to keep about 20 picked military agents in close touch with what is going on at the places in South Manchuria where the Japanese troops are".[61]

The opening of 1911 saw the occurrence of the so-called "Chiaotou Incident". Here was a conflict between Chinese and Japanese police authority

[60] *Manchuria Daily News*, Sept. 28, 1910.
[61] *Ibidem*, Nov. 29, 1910.

in the Antung-Mukden railway section, caused by the arrest of a Chinese by a Chinese officer in the employ of the Japanese police. Violence resulted from the incident, in which Chinese mobs were reported to have attacked the Japanese at Chiaotou, the fracas resulting in the wounding of several Chinese civilians. The Japanese police called upon the railway guard, who dispersed the rioters. The official statements of the two sides in this controversy are so irreconcilable that it is quite impossible either to recount unquestioned fact or appraise fault. It illustrates, however, the type of incident that has occurred very frequently ever since.[62]

Another case may be selected from the events of 1913 to illustrate the high-handed conduct of Japanese policemen in the railway areas and the hostility which naturally must arise when this comes into conflict with the lumbering methods of the Chinese laborer. It appears that a Chinese workman, in September, 1913, committed at Changchun the unfortunate accident of running a wheelbarrow over the foot of a Japanese soldier who was in civilian dress! Words and blows then passed between two policemen representing the international issue, followed by reënforcements to each, and, in consequence a general free-for-all. Actually, the humor of the *causus belli* was forgotten in the mild war which followed. The case is a good illustration of the friction

[62] Cf. *Manchuria Daily News*, Feb. 14, 1911, for a Japanese account. Also, March 16, 1911, for a counter-statement of the Chinese case.

which is bound to arise where the Japanese railway guards or police are permitted to go outside the restricted railway areas themselves. At the time, it was quite evident that Japanese soldiers had frequently gone into the Chinese walled-city at Changchun. The Chinese authorities claimed that no Japanese police of any character were entitled to transgress the boundaries of the railway towns themselves. Japan replied that it was occasionally necessary to despatch individual police or contingents of soldiers into the walled towns to bring Chinese offenders to justice.[63]

In the following year a series of robberies by Chinese high-jackers, particularly near Tiehling, Kaiyuan, and Ssupingkai, was reported in the Japanese press. In this connection the *Manchuria Daily News,* the Japanese organ at Dairen which has never been known to impute error or misconduct to the Japanese police or railway guards in South Manchuria, published an editorial news item which, aside from its obvious bias, does deserve quotation not alone because it contains the essence of one of the major problems in connection with the restriction of the authority of the Japanese railway guards to the railway areas themselves:[64]

"Once outside the narrow strip of the South Manchuria Railway area, with reservations of suitable sizes for railway towns at the different stations, Chinese outlaws will have

[63] *Manchuria Daily News,* Sept. 19, 1913. The notorious "Changli Incident" also occurred in 1913. (*Vide:* Hornbeck, *Contemporary Politics in the Far East,* p. 269.)

[64] *Manchuria Daily News,* June 13, 1914.

nothing to fear but the lax and easy-going Chinese police and patrols. How the authority of the law is being upheld in the Chinese territory we shall not reiterate here. It may be likened to a river with creeks of more or less extent. The Japanese may be compared to fish and the Chinese rogues to frogs. Tough frogs may victimize some defenceless fish, and if they be foolish enough to be in the river, the policing fish catch them, but these aquatic rascals will lose no time to be out of the danger zone and to leap out of water beyond reach of the policing fish. Such an anomaly cannot be kept up everlastingly to the standing menace of life and property in the railway areas.

"Until the Chinese policing system attains a sufficient degree of efficiency to guarantee the safety of life and property, the Japanese policing and patrolling authorities ought to be allowed to exercise their duty even outside the railway areas without first going through the cumbrous formality to communicate with the Chinese authorities, whenever the felons who have perpetrated crimes in the railway area or suspects are under pursuit."

From fully a score of cases which have come to my attention along the South Manchuria Railway I am convinced that the great majority of such incidents as arise between Chinese and Japanese police are due to the liberal manner in which the Japanese railway guards and police interpret their claim of right to patrol the railway areas themselves. The fact is that they trespass upon Chinese territory outside the railway areas as frequently as they make formal request for such permission from the Chinese local authorities. But it would be quite impossible to say whether in the majority of cases such trespass is not essential to the very function of

patrolling the railway towns themselves. Criminals are rarely caught in the act, and escape to the adjoining areas of Chinese jurisdiction is comparatively easy, since they are contiguous and the Japanese railway towns are, in most cases, not large. High Japanese officials at Dairen have asserted to me that it is quite impossible to confine the railway police strictly to the railway towns because of the cumbrous and inefficient character of the local Chinese police systems.

Here, then, is an apparent dilemma, for, except when specifically authorized by Chinese authorities, there is assuredly no legal right for the Japanese police or railway guards to enter the Chinese cities at all. There are but two alternatives: either the Japanese police system would have to be withdrawn entirely to give place to a Chinese force under Chinese authority, or a system of coöperative police between the Chinese and Japanese would have to be instituted. At all events, the Japanese "railway guards" exist with less legal right than the police system of the municipal areas.

The situation arising from this activity of the Japanese police officers outside the railway towns themselves has been much the same during the last five years as it was before 1915. Several cases of 1929 were particularly unfortunate. During June several Japanese policemen, attached to the station at Tashihchiao, proceeded to a nearby village, outside Japanese jurisdiction, to make the arrest of one

Chang Yü-t'ang, who was suspected of being involved in the murder of a Japanese morphine dealer. Failing to find the accused, the Japanese police took custody of his father, and a village elder, and confined them in the Japanese police station at Tashihchiao. The accused was later found, but when he was being taken to the Japanese police station he was shot and killed for attempting to escape.[65]

A more serious incident occurred at Tiehling in September of 1929 when two intoxicated Japanese soldiers, on leave during a holiday and enjoying themselves in the Chinese city near the Japanese railway town, interfered without provocation in a quarrel between two Chinese policemen. One of the Chinese policemen fired upon and wounded both of the Japanese soldiers. Shortly thereafter several Japanese soldiers entered the Chinese police station where an exchange of rifle fire occurred. Soon the streets were lined with Japanese troops, armed with machine guns. When the Chinese authorities refused to turn the Commissioner of Public Safety over to the Japanese soldiers, the Japanese forced the gates of the compound, disarmed the Chinese police, and brutally insulted them. Much property was destroyed in the process. Several Chinese policemen were then removed under Japanese guard to the adjoining railway area. As a result of the inci-

[65] The account of this and of subsequent incidents is taken, in the main, from materials on record in the Chinese Foreign Intercourse Office at Mukden.

dent, the Chinese police captain, mortified and insulted, committed suicide.

In the negotiations attending the adjustment of this incident the Chinese officially submitted that the cause of the affair was the unjustified interference of the two Japanese soldiers in a brawl between Chinese policemen, which did not concern them, as the place where it occurred was entirely outside of Japanese jurisdiction. The resort to force to settle the issue, instead of permitting the matter to be adjusted from the outset by negotiations, was stressed, and a request was made that in future " no Japanese soldiers or policemen should be permitted to enter Chinese-controlled territory without the consent of the Chinese authorities ".[66]

Finally, a type of case which is a cause of constant irritation to the Chinese and of criticism by the Japanese may be cited to illustrate the almost inevitable friction over the stationing of troops along the railway. This case occurred at Changchun in September of 1929, at the time when Chinese troops were prevented by the South Manchuria Railway Company and the Japanese Government from using this railway to proceed to Harbin and the scene of the border hostilities with Soviet Rusia. The incident itself,

[66] A somewhat different version of this incident may be found in the *Manchuria Daily News* for Sept. 24 and 25, 1929. This account explains that the fracas was started when two Japanese soldiers attempted to " mediate " in the quarrel between the Chinese policemen. The account given above, whether correct in details or not, is the official Chinese version.

however, was not related to those troop movements, except that concurrently the Japanese reënforced their garrison at Changchun, and during September conducted maneuvers outside the Japanese jurisdictional areas. Just which side was responsible for the first firing when a company of Japanese troops emerged from a *kaoliang* field would be difficult to say. At all events the Japanese troops surrounded the Chinese police station, demanded the arrest of a Chinese policeman who had fired into the field, suspecting the Japanese to be bandits, and carried off several Chinese police to the headquarters of the gendarmerie. What transpired there it is needless to recount. When the incident was reported to the local Chinese commissioner for foreign affairs he negotiated with the Japanese consulate for a settlement, which soon obtained the release of the imprisoned Chinese. The Chinese authorities maintained that the Japanese troops had no right to be conducting maneuvers outside the railway areas without the express approval of the authorities, and protested against the destruction of agricultural crops.[67]

[67] There is a great deal of contemporary popular and official Chinese criticism of this practice of the Japanese troops in conducting maneuvers outside the South Manchuria Railway areas themselves. In February, 1931, in reply to such criticisms, Japanese *Chargé d'Affaires* at Shanghai, Mr. Shigemitsu, is reported to have sent a reply to the National Government at Nanking containing substantially this statement: "Field exercises by the soldiers of the Japanese Garrison Division and the Japanese Railway Guard in South Manchuria are permissible under terms of the existing treaties and also from usage,

Official Japanese reports of banditry and pilferage along the South Manchuria Railway lines continue to be published.* During 1930 and 1931 the Japanese-edited *Manchuria Daily News* has continued to publish editorial articles purporting to give evidence of removal of rails and stealing of telegraph wires, the impression being left that South Manchuria is in a state of complete disorder, as far as Chinese-administered areas are concerned. No one really familiar with the situation can question the fact that there exists today in many of the Chinese towns adjoining the Japanese-administered railway municipalities a deplorable situation, manifested, for example, in Chinese police connivance with local high-jackers who exact tolls from innocent mer-

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and there can be no reason why attacks should be made openly against them, and the National Government is requested to exercise better control of the misdirected attacks." (*Manchuria Daily News*, Feb. 27, 1931.)

If such an official declaration were made, which is somewhat doubtful, the reference to treaty right to permit Japanese troops to conduct maneuvers outside the railway areas is in error. As for usage, it is quite evident as, repeated cases, especially that at Changchun in 1929, illustrate, the fact of precedent, actually set unilaterally by the Japanese authorities, cannot be resorted to as a claim to legal validity.

That this question of the Japanese railway guards along the South Manchuria Railway is one of the most vital problems confronting Japan and China in Manchuria is evidenced by the reported address of Dr. C. T. Wang on February 2, 1931, at a place near Hangchow. Dr. Wang is reported to have declared on that occasion that if the Japanese Government fail to indicate a willingness to negotiate amicably and with a spirit of compromise on this issue, China will be left with no other alternative but to resort to such forceful methods as may be at her disposal. (*Manchuria Daily News*, Feb. 7, 1931.)

* *Vide: Second Report on Progress in Manchuria to 1930*, pp. 17-18.

chants and the populace generally. No one, on the other hand, who can claim impartiality in this situation can accept the lurid tales of attempted train wrecking and the outworn scare-stories of pilferage of telegraph wires and embankment sandbags without accepting them *cum grano salis*.

A comparison with the situation along Chinese-controlled railway lines in Manchuria, as well as the Chinese Eastern Railway, will give evidence that, generally speaking, their trains operate without interference either by bandits or local kleptomaniacs. What would seem to be needed in such a situation as this would be an impartial investigation by a commission of inquiry, composed of individuals who would not take the task as a junket tour of the Far East, but who would reside in Manchuria for a twelve-month. Neither the Chinese nor the Japanese government, however, have ever indicated their desire for such specific investigation.

For very few of the incidents, recounted above, can there be said to have been anything fairly characterized as judicial settlement, arbitration or adjustment on the basis of the equities of the cases themselves. Notoriously, the Tiehling incident of 1929 remains " settled " only in the sense that the affair has been dropped. Occasions for friction between the Japanese police or railway guards and the native Chinese police or soldiery are so numerous that the past is eclipsed by the more pressing events of the hour. Grievance has been piled upon

grievance until a temper has been produced in South Manchuria which not only will make future fair settlement of past cases exceedingly difficult, but will continue as provocation for more friction.

The incidents described above have not been recounted in order to impute responsibility in given cases. They need to have been noted, however, because so little has ever been published concerning them, and a knowledge of them is essential to an appreciation of the inherent legal problems involved in this subject of Japanese railway guards and police in South Manchuria, particularly as affecting the railway itself. These incidents give evidence, supported by the actual organization through interlocking of the various Japanese police agencies in Manchuria, that the so-called railway "zone" shades, for many purposes, imperceptibly into the "interior" of South Manchuria. This problem of the Japanese railway guards along the South Manchuria Railway may be expected to become increasingly grave as an international issue. So far, there has been no evidence of a desire on the part of either Japan or China to attempt a solution through compromise.

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